No. 571.

LAURA EICHEL et al., Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

It is hereby stipulated and agreed by and between counsel for the respective parties in the above entitled case that the printed volume marked "1", of the certified transcript of the record, being the record on a previous appeal and disposed of by this Court as No. 397, of October Term, 1915 (239 U. S. page 629), need not be reprinted, counsel waiving copies thereof, but that ten printed copies of this part of the record may be filed with the Clerk, in lieu of the thirty copies required by the Rule, for the use of the Court in considering the case.

WM. M. HALL,
Counsel for the Appellants.
WM. E. SCHOYER,
Counsel for the Appellee.

[Endorsed:] File No. 26,038. Supreme Court U. S., October Term, 1917. Term No. 571. Laura Eichel et al., Appellants, vs. United States Fidelity & Guaranty Co. Stipulation as to printing record. Filed July 31, 1917.

Endorsed on cover: File No. 26,038. U. S. Circuit Court Appeals, 3d Circuit. Term No. 571. Laura Eichel, Madison J. Bray and Philip W. Frey, Appellants, vs. United States Fidelity & Guaranty Company. Filed July 14th, 1917. File No. 26,038.

Vol. II

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 871.

LAURA EICHEL, MADISON J. BRAY, AND PHILIP W. [illegible],
APPELLANTS,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

[illegible]

(26,038)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 571.

LAURA EICHEL, MADISON J. BRAY, AND PHILIP W. FREY, APPELLANTS,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

VOLUME II.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 2, 1917.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

No. **MARCH TERM, 1917.**

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation of the State of Maryland, Appellee—Appellant,

and

LAURA EICHEL, JACOB EICHEL, MADISON J. BRAY and PHILIP W. FREY, Appellants—Appellees.

Among the rolls, records and judicial proceedings had in the District Court of the United States in and for the Western District of Pennsylvania, at No. 188 in equity, may be found the following words and figures, to wit:

Docket Entries Since Mandate.

December 23, 1915, Mandate from U. S. Circuit Court of Appeals reversing the decree of this Court, with costs, and with instructions to enter a decree in accordance with the opinion of said U. S. Circuit Court of Appeals filed.

February 18, 1916, Praecipe for appearance of Schaffer & Schoyer for plaintiff filed.

July 3, 1916, Costs on Appeal (Deft.) filed.

July 14, 1916, Praecipe for commission to take testimony of Jacob Eichel and others on the part of the defendants, with interrogatories and notice accepted, also order of court filed and entered.

July 25, 1916, Objection to issuance of commission to take testimony and exceptions to interrogatories.

August 3, 1916, Order endorsed upon interrogatories filed July 14, 1916, overruling objections, etc., entered. Exceptions noted.

August 9, 1916, Commission and Interrogatories issued to Adolph F. Decker, Notary Public, Evansville, Indiana.

August 21, 1916, Depositions taken before Adolph F. Decker, Notary Public, Evansville, Indiana, received and filed.

August 29, 1916, Exceptions to answers to Interrogatories filed.

August 30, 1916, Praecipe to put case on Equity Calendar filed.

October 16, 1916, Plaintiff's witness, H. P. Camden, sworn.

October 16, 1916, Defendant's witness, George N. Seaman, sworn.

October 16, 1916, Case argued, C. A. V.

October 16, 1916, Memoranda of trial filed.

October 16, 1916, Request of Laura Eichel for findings of fact and conclusion of law filed.

October 16, 1916, Supplemental request of Laura Eichel for finding of fact filed.

November 8, 1916, Opinion filed and entered.

November 10, 1916, Petition of Laura Eichel for new trial, rehearing and reargument and Order thereon refusing same, with an exception noted for the benefit of Laura Eichel, filed and entered.

December 6, 1916, Decree filed and entered.

December 8, 1916, Petition of defendants for appeal and Order allowing same filed and entered.

December 8, 1916, Assignments of Error filed.

December 8, 1916, Bond on appeal approved and filed.

December 8, 1916, Testimony filed.

December 11, 1916, Citation awarded and issued.

December 12, 1916, Citation returned, accepted. Acceptance by Wm. E. Schoyer, attorney for U. S. Fidelity & Guaranty Company, Appellee.

December 16, 1916, Stipulation and order as to contents of record on appeal filed and entered.

December 21, 1916, Petition of U. S. Fidelity & Guaranty Co., for appeal and order allowing same filed and entered.

December 21, 1916, Assignments of Error filed.

December 21, 1916, Stipulation as to Bond filed.

December 21, 1916, Stipulation as to record and order approving same filed and entered.

December 21, 1916, Bond *sur* appeal of U. S. Fidelity & Guaranty Co., approved and filed; the bond heretofore filed on first appeal superseded and declared null and void.

December 22, 1916, Citation awarded and issued.

December 22, 1916, Service of Citation accepted by Wm. M. Hall, attorney for Laura Eichel, Madison J. Bray and Philip W. Frey.

Deposition of Jacob Eichel.

FILED AUGUST 21, 1916.

1st Interrogatory: What relation are you to Laura Eichel, one of the above-named defendants? Where do you reside?

Answer: Her husband. Evansville, Indiana.

2nd Interrogatory: Do you know anything about the purchase of the claims of the Pittsburgh Trolley Pole Company and of Nicola Brothers Company claims against the Evansville Contract Company, referred to by you in your testimony in this case at its former trial? When were these claims purchased, and for how much, and who paid the purchase money to the Pittsburgh Trolley Pole Company and to Nicola Brothers Company? If you have any evidence of checks used for these payments, produce them, or require them to be produced to the Commissioner and filed with his return.

Answer: I know all about it. They were purchased early in 1904. The claims were $1,833.97 less 15%, net $1,557.88. I gave a check on William Eichel, President of the Eichel Lime & Stone Company, Evansville, Indiana. I have no checks, but I have a ledger which on page 238 shows that William Eichel paid it by check on the Citizens National Bank.

3rd Interrogatory: With relation to the purchase of various claims, which have been referred to in this case as material claims, in the year 1904, what, if any, work did you do in making said purchases; what trips did you take; where did you travel; what expenditures did you make, and how much time did you spend? Give this in detail, as far as you can. How much was your time worth, and what would you consider a fair and reasonable charge therefor? Give your reasons.

Answer: I purchased all of the claims for Laura Eichel and traveled from place to place a number of times to get them—six trips to Pittsburgh, two trips to Charleston, South Carolina, three trips to Cleveland. To the best of my recollection my traveling expense was about $250.00.

This litigation has been going on for nearly twelve years and I charged six months solid time in purchasing and trying to collect these claims—six months at $500.00 per month. My time was worth $500.00 per month, and I consider that a fair and reasonable charge therefor. As I said before, it is nearly twelve years that this litigation is going on and my estimate of spending six solid months is a very conservative one, as I have been called from time to time to Pittsburgh to consult with our attorney, Mr. Hall, and attending different trials, and time in purchasing those claims.

4th Interrogatory: Starting with the year 1907, what, if any, expenses has Laura Eichel paid out under your supervision in and about the litigation of these so-called material claims now in litigation in this suit, being the claims upon which she has sued the plaintiff at Pittsburgh? Give a list of these expenses and their dates of payment, and state for what services or expenses they were. Who has paid them? Has M. J. Bray paid any of them, and has he made any charge to Laura Eichel for them? Are there any bills outstanding and unpaid or for attorney's fees in and about the litigation with the plaintiff upon these claims, and if so, to whom are such bills or with whom have the been incurred, and what are they? What effect will they have on the amount of money received on said claims?

Answer: I have a statement here taken from the books which I am willing to file or go over it in detail, amounting to $1,182.36. I am willing to file this statement itemized, and I now do file this statement of expenses paid out by Laura Eichel as a part of my deposition and ask that it be marked Exhibit "A." I had better explain one thing. Hall & Metcalf and William M. Hall are our attorneys and Mr. Frey is also our attorney, and those last seven items were for the last trial had by Judge Orr in Pittsburgh in 1913. Laura Eichel has paid them. Mr. Bray has paid none of the items in this list. Mr. Hall, our attorney at Pittsburgh, informed me that he has a bill of $2,500.00 for services in the different courts so far, the courts at Pittsburgh, Philadelphia, and in the Supreme Court of the

United States. It will reduce the amount of money to be received.

5th Interrogatory: Has suit been brought by Madison J. Bray against Laura Eichel and you on the note of $27,-037.39, dated December 31, 1906, payable on demand, given by you and Laura Eichel to said Madison J. Bray, being the note referred to on the former trial of this case? In what court has this suit been brought, and what is the status of this suit?

Answer: Yes; it is brought in the Superior Court of Vanderburgh County, Indiana. I believe it is set for trial in October.

And now said witness is orally cross-examined by Mr. William E. Schoyer of Counsel for plaintiff, as follows:

6th Cross-Interrogatory: With whom did you negotiate in the purchase of the Pittsburgh Trolley Pole claim?

Answer: With the officers of that company; I don't remember their names.

7th Cross-Interrogatory: You don't remember the individuals?

Answer: No, sir.

8th Cross-Interrogatory: Do you remember who you negotiated with in the purchase of the Nicola claim?

Answer: The same thing; I negotiated in their office, but I don't know who was present. I think it was one of the Mr. Nicolas.

9th Cross-Interrogatory: Do you remember whether you yourself negotiated for the Trolley Pole claim?

Answer: Yes, sir.

10th Cross-Interrogatory: Do you remember what time?

Answer: Early in 1904.

11th Cross-Interrogatory: Did you make more than one trip to Pittsburgh to negotiate for these two claims?

Answer. There was other claims at Pittsburgh.

12th Cross-Interrogatory: I am talking about these two?

Answer: I don't know that; there was a lot of claims at Pittsburgh.

13th Cross-Interrogatory: Did you go over the books of these two companies before purchasing the claims to see if they were all right?

Answer: No, sir, I went over our books; I knew they were all right because they corresponded with our books.

14th Cross-Interrogatory: What collateral did the Nicola Brothers have on their claim?

Answer: They had none that I know of.

15th Cross-Interrogatory: What collateral did the Trolley Pole Company have?

Answer: They had none.

16th Cross-Interrogatory: At the time of bankruptcy wasn't the Nicola Brothers claim over $11,000.00?

Answer: No; they had some lumber which they were just delivering and which wasn't actually delivered to us and the receiver took that lumber and paid for it. They just commenced delivering lumber and the receiver he needed the lumber, the trustee, I mean.

17th Cross-Interrogatory: When had they sold you that lumber?

Answer: I don't remember; just a short while before the company went in bankruptcy.

18th Cross-Interrogatory: Is it not true that on the first of February, 1904, they had a claim against you for over $11,000.00?

Answer: That is what I said; they had that lumber claim which was just delivering and none of it used, and the Trustee agreed to take the lumber and pay for it.

19th Cross-Interrogatory: The lumber had been delivered before bankruptcy?

Answer: Part of it only; they had just commenced delivering.

20th Cross-Interrogatory: And is it not true that on

December 31, 1903, they had a note of the Evansville Contract Company for $10,313.03?

Answer: That is, I guess, correct; that is for that lumber I am speaking of.

21st Cross-Interrogatory: Do you know when that note was given?

Answer: I can't tell that, but they held that note as security for that lumber.

22nd Cross-Interrogatory: And you say that lumber had been contracted for before that time and wasn't delivered, before the bankruptcy?

Answer: Part of it was delivered.

23rd Cross-Interrogatory: To what extent was it delivered?

Answer: It must have been to the extent of the note, but the lumher wasn't used.

24th Cross-Interrogatory: And do you remember that they were paid on account the sum of $10,000.00 on April 13th, 1904, by two checks of $5,000.00 each?

Answer: I suppose that may be correct; I don't remember it.

25th Cross-Interrogatory: If that was true it was paid by the trustee in bankruptcy, was it? By Mr. Bray and the other trustees?

Answer: Yes, sir, they had the lumber on hand then.

26th Cross-Interrogatory: Do you recall how soon after bankruptcy you took up these negotiations with Nicola? Was it in the month of March?

Answer: I think it was about that time.

27th Cross-Interrogatory: And you say you bought this claim of Nicola Brothers Company and the Pittsburgh Trolley Pole Company at a 15% discount?

Answer: Yes, sir.

28th Cross-Interrogatory: How do you know it was 15%?

Answer: That is the best of my recollection; that was twelve years ago and that is the best I can recollect.

29th Cross-Interrogatory: In the year 1913 in the

trial at Pittsburgh you said that you bought these two claims at a discount of ten or fifteen per cent., maybe a little more or a little less?

Answer: Yes, that is right.

30th Cross-Interrogatory: You don't recollect any more about it now than you did then, do you?

Answer: To the best of my recollection it was 15%.

31st Cross-Interrogatory: Have you anything to show anywhere?

Answer: Nothing except memory.

32nd Cross-Interrogatory: You have no more to refresh your memory now than you had in 1913, have you?

Answer: No, except I have been thinking about it.

33rd Cross-Interrogatory: Your memory is not much better now than it was then?

Answer: No, sir, that is the best I can recollect.

34th Cross-Interrogatory: In Pittsburgh, in the trial referred to, this question was asked you: "How much did you pay for the Nicola Brothers? Answer: As I have said as to both of them, I can't state exactly. Question: Well, how much of a discount? Answer: I can't remember; my best impression is 15%; it might be a little less or a little more." You can't say any more now than you could then, can you?

Answer: No, sir, not a bit more.

36th Cross-Interrogatory: All you can say now is that it was 15% more or less as to both of these claims?

Answer: I don't think it was any more but the best of my recollection is it was 15%.

37th Cross-Interrogatory: But you don't know?

Answer: I can swear only to the best of my knowledge.

38th Cross-Interrogatory: You have had no data to refresh your memory since the trial in Pittsburgh in 1913?

Answer: Yes, sir, I have gone over books.

39th Cross-Interrogatory: What data have you got?

Answer: I have got the date we paid it and by that way it shows me it was 15%.

40th Cross-Interrogatory: What is that date?

Answer: I have got it right here—April 4, 1904.

41st Cross-Interrogatory: What claim was that?

Answer: Both claims together.

42nd Cross-Interrogatory: Both claims were what?

Answer: $1,833.97.

43rd Cross-Interrogatory: That was the face of the claims?

Answer: Yes, sir.

44th Cross-Interrogatory: And how were they paid for?

Answer: William Eichel paid for them by check of the Eichel Lime & Stone Company on the Citizens National Bank. William Eichel was President of the Eichel Lime & Stone Company.

45th Cross-Interrogatory: Have you got that check?

Answer: I have no check; I took this from the book.

46th Cross-Interrogatory: What has happened to the check?

Answer: That is twelve years ago; I don't know; we couldn't find checks of twelve years ago; I know I looked for them and I can't find them.

47th Cross-Interrogatory: This matter was in litigation long before twelve years ago, wasn't it?

Answer: The book shows we paid for it and how we paid for it.

48th Cross-Interrogatory: Have you got the books?

Answer: Yes, sir.

49th Cross-Interrogatory: Have you got them here?

Answer: We have got them at the office. They show we paid them that day.

50th Cross-Interrogatory: Was there one check or two checks?

Answer: One check.

51st Cross-Interrogatory: The check was the check of the Eichel Lime & Stone Company, you say?

Answer: Yes, sir.

52nd Cross-Interrogatory: To whose order was it made?

Answer: To the Citizens National Bank; we paid it; William Eichel was President and he took the money and paid it.

53rd Cross-Interrogatory: And what was the amount of that check?

Answer: There is no check; the book shows that we paid this amount on that date.

54th Cross-Interrogatory: You said there was a check of the Eichel Lime & Stone Company to the Citizens National Bank?

Answer: The book shows it was paid to the Citizens National Bank.

55th Cross-Interrogatory: That amount of money on that date?

Answer: That entry was made in 1904, yes, sir.

56th Cross-Interrogatory: I think we ought to have those books, Mr. Eichel?

Answer: There is only one book.

57th Cross-Interrogatory Could you send for it?

Answer: Yes, sir.

And now the book in question is produced by the witness.

58th Cross-Interrogatory: Now Mr. Eichel, this book you have produced here is the ledger of the Eichel Lime & Stone Company, is it?

Answer: Yes, sir.

59th Cross-Interrogatory: And you refer to an item on page 238 in connection with the purchase of these two claims?

Answer: Yes, sir.

60th Cross-Interrogatory: Will you point out that item, please?

Answer: There it is (indicating).

61st Cross-Interrogatory: On the fifth line on page 238 is an item as follows: April 23 4 months Citizens National Bank $1,833.97.

Answer: Yes, sir.

62nd Cross-Interrogatory: Do you know what the figures 38 refer to?

Answer: That is the cash book, I guess.

63rd Cross-Interrogatory: All this entry shows is that there was borrowed at the Citizens National Bank on that date the sum of $1,833.97 and you put up the two assignments as collateral security for that loan?

Answer: Yes, sir.

64th Cross-Interrogatory: Was that the date these amounts were paid?

Answer: I guess so.

65th Cross-Interrogatory: The Nicola Brothers claim was assigned to William Eichel under date of April 15, 1914. That is correct, is it not?

Answer: I suppose so.

66th Cross-Interrogatory: This was paid on April 23. That is right?

Answer: Yes, sir.

67th Cross-Interrogatory: And the trolley pole claim was assigned to William Eichel under date of April 16, 1904?

Answer: That is right; and a few days afterwards, at the time the drafts got here, he got the money from the bank and paid them off.

68th Cross-Interrogatory: Now Mr. Eichel, isn't it true that nothing whatever was paid to the Nicola Brothers Company for the claim assigned to William Eichel?

Answer: No, sir, that is not true.

69th Cross-Interrogatory: Is it not true that in consideration of the payment being made for that lumber you spoke of, of $10,000.00, that that claim for the balance of $1,199.00 was given over to you or to your son?

Answer: That is not true.

70th Cross-Interrogatory: You swear that is not true; that they got money for it?

Answer: They got just what I stated; to the best of my knowledge, 15% less.

71st Cross-Interrogatory: You say the Trolley Pole Company had no collateral?

Answer: Of course not.

72nd Cross-Interrogatory: Had they delivered anything that was in the same situation as the Nicola Brothers Company that had not been paid for and which the trustees in bankruptcy paid for later?

Answer: No, sir.

73rd Cross-Interrogatory: Do you remember those two checks for $5,000.00 each being paid by the trustees in bankruptcy to Nicola Brothers on or about April 13, 1904?

Answer: Yes, sir.

74th Cross-Interrogatory: And would you still say that they got money for this claim if their books would show that at that time the Evansville Contract Company owed them $11,149.00 and that account was credited with two checks of $5,000.00 each on April 13, 1904, leaving a balance of $1,149.00 which was charged to suspended account; would you still say they got money for that $1,149.00?

Answer: I bought this claim from Nicola Brothers just as I stated and that lumber business was a separate settlement; that lumber was on hand and the trustee needed it and if he hadn't paid for it your company would have been liable for just that much more; that is all the difference; it simply saved your company from liability of ten or eleven thousand dollars.

75th Cross-Interrogatory: Who made the negotiations by virtue of which the $10,000.00 was paid. Did you handle that?

Answer: I think I did.

76th Cross-Interrogatory: So far as your books show, the whole transaction with the Citizens National Bank was that the Eichel Lime & Stone Company borrowed $1,833.97, the face of the claims?

Answer: And paid for those claims.

77th Cross-Interrogatory: And you say that out of that money they paid for those claims?

Answer: Yes, sir.

78th Cross-Interrogatory: There was no question of that—William Eichel or the Eichel Lime & Stone Company gave a check to the bank?

Answer: They undoubtedly gave a check; they borrowed this money.

79th Cross-Interrogatory: Wasn't this money placed to the credit of the Eichel Lime & Stone Company?

Answer: Yes, sir, and certificates put up as collateral and then afterwards my wife had to pay that note and take up those certificates and that is how she became the owner of them.

80th Cross-Interrogatory: When did she pay it?

Answer: She paid it several years after, when they demanded the money.

81st Cross-Interrogatory: Didn't the Eichel Lime & Stone Company pay it?

Answer: No, my wife paid that; she paid it herself; she borrowed the money of Mr. Bray and of the bank.

82nd Cross-Interrogatory: This claim was assigned to William Eichel and then to the Citizens National Bank and then it was assigned back to you about December 3, 1906. Did you pay any money for it at that time?

Answer: My wife did.

83rd Cross-Interrogatory: Your wife paid that money, you say, at that time?

Answer: Yes, sir.

84th Cross-Interrogatory: How did she pay it?

Answer: By cash. She paid it by a check of Mr. Bray and a check of the City National Bank. The Citizens National Bank failed and we had to take up all the notes there was there and my wife borrowed the money of Mr. Bray and of the City National Bank to take up those notes and she has since then repaid them, repaid the bank and repaid Mr. Bray.

85th Cross-Interrogatory: And that was assigned to you and a couple of weeks later was assigned to your wife by you?

Answer: Yes, sir, she was the owner of it; she owned it and paid for it.

86th Cross-Interrogatory: And she has paid Mr. Bray that amount, has she?

Answer: There was other notes due in that bank and we borrowed the money of Mr. Bray and of the City National Bank, she did, and Mr. Bray got collateral, and he was repaid for that and he gave up the collateral. If you want to know how it was paid I can go into further details with it.

87th Cross-Interrogatory: Did she give her own check to the bank for this amount?

Answer: I think probably she did; I think Mr. Bray gave her a check on the City National Bank and she borrowed money at the City National Bank besides and she put up collateral.

88th Cross-Interrogatory: Is this suit of Mr. Bray merely on the $27,000.00 note or on other notes?

Answer: On other notes, too. He claims a note of $4,500.00 against my wife, I think, and he claims two notes against me individually; that is the best of my recollection.

89th Cross-Interrogatory: For how long a time is it that you and Mr. Bray haven't been on good terms?

Answer: I suppose six months; something like that; four or five months; I don't know.

90th Cross-Interrogatory: You both are still represented by Mr. Hall in Pittsburgh?

Answer: I don't know; if Mr. Hall is employed to collect these claims whatever interest Mr. Bray has of course he represents him the same as he does me, or my wife rather.

91st Cross-Interrogatory: In this bill of Mr. Hall of $2,500.00, does that cover everything up to date?

Answer: Mr. Hall sent me word a few weeks ago that he would have at least $2,500.00 against us for services rendered in the case at Pittsburgh, Philadelphia and Washington; I don't know how much more he will have.

92nd Cross-Interrogatory: Do you know how the

money was actually paid to Nicola Brothers and the Trolley Pole Company?

Answer: Yes, sir. I gave them drafts.

93rd Cross-Interrogatory: You gave them drafts on whom?

Answer: William Eichel.

94th Cross-Interrogatory: Not on the Eichel Lime & Stone Company?

Answer: No, sir.

95th Cross-Interrogatory: Drafts direct on William Eichel?

Answer: Yes, sir.

96th Cross-Interrogatory: And how did he pay for those drafts? Were not those the amounts that were paid for by the Citizens National Bank?

Answer: He took those drafts—he took those claims; he borrowed money from the Citizens National Bank from day to day, we did business there; he took those drafts and borrowed that day and left the money in the bank to pay for them and put them up as collateral.

97th Cross-Interrogatory: That is, he borrowed the face of the claims on the claims?

Answer: He borrowed as much as he needed.

98th Cross-Interrogatory: And you used from the amounts he borrowed on them enough to pay for the claims?

Answer: Yes, sir; that is the way they come to be held by the Citizens National Bank.

99th Cross-Interrogatory: You say, Mr. Eichel, that you purchased all these claims now held by Laura Eichel; that is, you negotiated for them?

Answer: Yes, sir.

100th Cross-Interrogatory: Didn't Mr. Heine negotiate for them?

Answer: No, sir.

101st Cross-Interrogatory: Even in cases where he drew drafts for them didn't he make any negotiations at all?

Answer: No, sir.

102nd Cross-Interrogatory: Didn't Mr. Bray negotiate for those for which he paid by his own check?

Answer: No, sir.

103rd Cross-Interrogatory: You negotiated all of them?

Answer: Yes, sir.

104th Cross-Interrogatory: You say you took two trips to Charleston; when did you take those trips?

Answer: Early in 1904.

105th Cross-Interrogatory: Outside of the Trolley Pole and the Nicola Brothers claims, all these claims were purchased beginning May 31, 1904, and ending November 21, 1904?

Answer: I guess so.

106th Cross-Interrogatory: What was the claim purchased in Charleston?

Answer: Have you got a claim there Southeastern Lime Company?

107th Cross-Interrogatory: Southeastern Lime & Cement Company?

Answer: That is the one.

108th Cross-Interrogatory: That was purchased on the 17th of September, 1904?

Answer: Well, I couldn't buy it at first.

109th Cross-Interrogatory: And you took two trips down there to purchase that?

Answer: Yes, sir.

110th Cross-Interrogatory: And the six trips to Pittsburgh you mention were not just to purchase claims; they were to consult with Mr. Hall partly, were they?

Answer: No, sir, that comes afterwards. There was a good many at Pittsburgh and I went there quite often to negotiate.

111th Cross-Interrogatory: As to your traveling expenses, you say they were $250.00?

Answer: That may be a little more or a little less, but that is as close as I can give you.

112th Cross-Interrogatory: You have no record of it?

Answer: No, sir, I am guessing as close as I can; it may be a little more or a little less. I can't tell exactly.

113th Cross-Interrogatory: Why do you say you charge six months' solid time in purchasing these claims?

Answer: In purchasing and trying to collect them, I stated.

114th Cross-Interrogatory: You mean referring to the whole period?

Answer: This suit was pending from the beginning at Pittsburgh; you know it took a good many trips and a great deal of time to consult with Mr. Hall and to get the papers ready for him and to assist him; it took at least six months' solid time in the last twelve years.

115th Cross-Interrogatory: And part of this time was in purchasing these claims from May to November, 1904?

Answer: That is not figured in this. All these expenses occurred after the claims were purchased and law suit begun.

116th Cross-Interrogatory: The question was with relation to the purchase of the various claims which have been referred to in this case—the material claims in 1904. What, if any, work did you do in making said purchase, what trips did you take, and so forth, and how much time did you spend? Give this in detail as far as you can. How much was your time worth, and what would you consider a fair and reasonable charge therefor, and give your reasons? Now, Mr. Eichel, the whole of that question refers to work done by you in 1904 in purchasing the claims only.

Answer: This six months is not figured in that.

117th Cross-Interrogatory: You are making no claim for time spent in 1904 at all?

Answer: I have got it stated there; only my actual expense.

118th Cross-Interrogatory: But the question, if you will just read over that question you will see that it refers only to 1904.

Answer: I made no charge for my time in 1904 in

purchasing these claims except my actual traveling expenses. There is no other charge in there.

119th Cross-Interrogatory: You want it understood that the only amount you are trying to claim is your actual traveling expenses during the year 1904?

Answer: This list shows exactly what I am claiming. (Witness refers to Exhibit "A" to his deposition.) $250.00 covers all my expenses in purchasing the claims.

120th Cross-Interrogatory: How do you figure your time worth $500.00 per month?

Answer: That is what my salary was when I worked for the trustee.

121st Cross-Interrogatory: You consider, do you, that you should collect the same amount from the surety as you got from the trustee when you are trying to enforce these claims against the surety at their face value?

Answer: I figured that my time was worth at any time $500.00 a month.

122nd Cross-Interrogatory: Irrespective of whom it was charged up to?

Answer: Yes, sir.

123rd Cross-Interrogatory: That somebody ought to pay you $500.00 a month?

Answer: If I worked for somebody.

124th Cross-Interrogatory: You were working for yourself or your wife at this time in doing all this?

Answer: I understand, but as I stated, it took six months' solid time without working for anybody.

125th Cross-Interrogatory: If you were working for yourself or your wife why do you want to charge this up as an expense in this case against the surety?

Answer: If the Guaranty Company had paid the claims as they ought to there would not have been any expense.

126th Cross-Interrogatory: It is your idea, is it, that because the surety company was successful in resisting these claims to the extent of the discount on them that therefore

they should pay your expenses in fighting to collect the face value?

Answer: I can't answer that question, I don't know what you refer to, except this: that I consider my time worth $500.00 a month; in place of six months I worked about four or five years on it.

127th Cross-Interrogatory: Have you any exact data as to the amount of time you spent, or is that merely a guess, as the $250.00 expense is?

Answer: It looks to me like it is very fair and conservative; I know I spent three times the amount of time on it what I stated there.

128th Cross-Interrogatory: This list of items in Exhibit "A", Mr. Eichel, is money paid out by you, is it?

Answer: Yes, sir.

129th Cross-Interrogatory: Your wife Laura Eichel paid none of these?

Answer: Whenever she had money I used some of her money, but the biggest part was paid by me for her.

130th Cross-Interrogatory: Do you know how much actual money she paid out of her own estate?

Answer: No, I can't tell that; I borrowed money from her when I never had any in my possession and I used it.

131st Cross-Interrogatory: Take these items of payments made to C. D. Dotson beginning May 20, 1907, $30.00; what was that for?

Answer: Mr. Dotson was the trustee and he made several trips to Pittsburgh to consult with Mr. Hall, and he saved me a trip from here up there.

132nd Cross-Interrogatory: That is simply for his expense?

Answer: That is for several trips.

133rd Cross-Interrogatory: You couldn't make many trips to Pittsburgh for $30.00?

Answer: He lived at Parkersburg and he made two or three trips I guess, or more than that, and that was the actual expense he had.

134th Cross-Interrogatory: And under date of September 23, 1907, P. W. Frey, $45.70; what is that?

Answer: What date is that?

135th Cross-Interrogatory: September 23, 1907?

Answer: That is for his expense of going to Pittsburgh from here to consult with Mr. Hall.

136th Cross-Interrogatory: He went to consult with Mr. Hall, did he?

Answer: Yes, sir; that is his actual expense; Mr. Frey is the attorney.

137th Cross-Interrogatory: And the items to J. D. Milan, what are they?

Answer: I think he is the stenographer at Parkersburg of the Referee, and he made some papers out for us.

138th Cross-Interrogatory: And what is this item of April 10, 1913, to R. J. Armstrong, $35.00?

Answer: That is a witness in that last trial; there were several men there and we had to pay their expense and per diem.

139th Cross-Interrogatory: What trial was that?

Answer: At Pittsburgh, in Judge Orr's court.

140th Cross-Interrogatory: There was no such man as that there, was there?

Answer: Yes, sir.

141st Cross-Interrogatory: He wasn't a witness there, was he?

Answer: I brought him there as a witness but didn't call him; he was there all right, and he was summoned too.

142nd Cross-Interrogatory: H. M. Meloney is the Clerk of the Circuit Court of Appeals for the Fourth Circuit?

Answer: Yes, sir.

143rd Cross-Interrogatory: What is the item of December 26, 1916, to C. D. Dotson?

Answer: It is, I guess, for one trip to Pittsburgh.

144th Cross-Interrogatory: What was his purpose in going to Pittsburgh at that time?

Answer: It may have been that he had it up at Parkersburg to get papers ready for us; we had to get papers

ready for Mr. Hall in his suit. It was for expense in this case to Dotson, either to get papers ready at Parkersburg or going to Pittsburgh.

145th Cross-Interrogatory: And these items to Hall & Metcalf and William M. Hall are for expenses and fees, are they?

Answer: I guess; what is the amount?

146th Cross-Interrogatory: July 27, 1907, William M. Hall, $112,00?

Answer: That is simply for getting papers ready.

147th Cross-Interrogatory: September 21, the same year, Hall & Metcalf, $35.00?

Answer: That is for expense.

148th Cross-Interrogatory: February 17, 1908, William M. Hall, $190.00, and September 7, 1908, William M. Hall, $50.00?

Answer: You know better than I do what we have to pay; that is what we paid them.

149th Cross-Interrogatory: Was any of this paid out for fees, or all for expense?

Answer: No, sir, I think Mr. Bray paid them some fees.

150th Cross-Interrogatory: Are any of these attorneys' fees contingent on the result of the suit?

Answer: No, sir. Some of those to Hall were for traveling expenses, but I only know what we paid them, traveling expenses to Philadelphia and Washington and the printing; that is what this mostly is.

151st Cross-Interrogatory: And all of this money but a small part of it was paid out of your own funds; you said some was paid by Laura Eichel but you can't tell how much?

Answer: No, sir.

153nd Cross-Interrogatory: Can you give any guess?

Answer: No, sir; I always had a few hundred dollars of her money, anywhere from three to five hundred dollars, and I paid with whatever money we had to pay with.

153rd Cross-Interrogatory: You never paid any large

amounts out of her funds, because there is no large amount here?

Answer: I can't tell, but that is what was paid out.

154th Cross-Interrogatory: None of this was paid by Mr. Bray?

Answer: No, sir.

155th Cross-Interrogatory: Was Mr. Frey paid anything for counsel in this matter?

Answer: Nothing except this traveling expense; I don't know if Mr. Bray paid him anything; I don't remember of anything except his traveling expense; I don't think he was paid anything else.

156th Cross-Interrogatory: Was he paid anything at all for helping put through the purchase of these claims, Mr. Frey, I mean? The original purchase in which he endorsed notes with Mr. Bray?

Answer: No, sir.

157th Cross-Interrogatory: In making these payments you conducted this entirely yourself? You don't mean to say you consulted with your wife before making these payments?

Answer: No, sir, she didn't know anything about it; she left those things to me.

158th Cross-Interrogatory: And some of these expenses were paid out for the suits brought in the Common Pleas Court at Pittsburgh, of course, and some in the United States Court?

Answer: All I have got in Pittsburgh is for some of the witnesses. I think Mr. Bray paid some of those here. The biggest items, the largest amount, is Hall and Hall & Metcalf in this business, and those witness fees in the trial at Pittsburgh.

159th Cross-Interrogatory: The original payments there to Hall and Hall & Metcalf were for filing suits in the Common Pleas Court?

Answer: I suppose some of it is for that purpose. We never questioned Mr. Hall; when he sent a bill we paid him.

160th Cross-Interrogatory: Who retained Mr. Hall originally, you or Mr. Bray?

Answer: I did.

161st Cross-Interrogatory: Had he been attorney for the Evansville Contract Company?

Answer: Yes, I had him employed before this. If I am not mistaken Mr. Bray was present when I employed Mr. Hall in this case, and he was attorney for the Evansville Contract Company before.

162nd Cross-Interrogatory: As to this suit brought against you by Mr. Bray; what attorney brought that suit for Mr. Bray?

Answer: I believe Walker & Walker of this city.

163rd Cross-Interrogatory: And who represents you?

Answer: Mr. Frey and Mr. Isidor Kahn.

164th Cross-Interrogatory: The suit, as I understand, is on the $27,000.00 note?

Answer: Yes, sir.

165th Cross-Interrogatory: When was it filed?

Answer: I don't remember exactly; probably Mr. Bray could answer that better than I; he filed it.

166th Cross-Interrogatory: You remember what month it was filed?

Answer: This year; I don't remember the month; it must be three or four months ago.

167th Cross-Interrogatory: You have filed an answer, have you, you and your wife?

Answer: Yes, sir.

168th Cross-Interrogatory: What does that answer set out?

Answer: I can't tell all that; that is in the hands of my lawyers; they filed the answers.

169th Cross-Interrogatory: Did Mr. Bray make any demand on you before bringing this suit, Mr. Eichel?

Answer: He made demand on my wife.

170th Cross-Interrogatory: And of course he made demand on you, too, as you are also on the note?

Answer: Mr. Bray and I wasn't on speaking terms,

and I believe he sent me word and he sent word to my wife he had to sue her. Of course we couldn't pay it.

171st Cross-Interrogatory: Are you not on speaking terms now?

Answer: No, sir.

172nd Cross-Interrogatory: You don't remember what your defense is to the note?

Answer: There is very little defense to it; my wife owes it.

173rd Cross-Interrogatory: Has interest been paid right along on this note since 1907?

Answer: I believe the interest has been paid up to last year, if I am not mistaken.

174th Cross-Interrogatory: At three per cent.?

Answer: Yes, sir.

175th Cross-Interrogatory: Did you pay it?

Answer: Yes, sir.

176th Cross-Interrogatory: Out of your own funds? That is, your wife, Laura Eichel, has not paid any interest on this note, has she?

Answer: I handle her business altogether, and when I pay it means her paying.

177th Cross-Interrogatory: You paid it out of your own money, though?

Answer: I had very little money for the last few years.

178th Cross-Interrogatory: Do you know whose money did pay it? Was it her money, or your money? I just want the facts, that is all.

Answer: You may say it is mostly her money, because she had her money invested in the Contract Company.

179th Cross-Interrogatory: In the Evansville Contract Company?

Answer: No, in the Ohio River Contract Company, and a settlement was made every six months.

180th Cross-Interrogatory: What checks paid the interest? The Ohio River Contract Company didn't pay the interest, did it?

Answer: There were no checks.

181st Cross-Interrogatory: How was it paid?

Answer: It was paid like it was charged to me; Mr. Bray's books show that.

182nd Cross-Interrogatory: Was it paid by your check?

Answer: No.

183rd Cross-Interrogatory: Was it paid by her checks?

Answer: She had credit on the company's books, you know.

184th Cross-Interrogatory: How would Mr. Bray be paid because she had credit in the company's books?

Answer: All we had to do, the company owed my wife that much less money.

185th Cross-Interrogatory: Was Mr. Bray interested in the company, too?

Answer: He advanced a large amount of money; he was treasurer.

186th Cross-Interrogatory: Are there any checks at all for the payment of this interest by you or Mrs. Eichel since the note was given?

Answer: Nothing but the settlement every six months, which Mr. Bray has got and I have got.

187th Cross-Interrogatory: How did he get the interest?

Answer: That is his business; I don't know.

188th Cross-Interrogatory: You don't know how he got it?

Answer: For instance, I had a credit with the company for a large amount myself.

189th Cross-Interrogatory: But you have no idea how Mr. Bray would get the 3% interest on his note?

Answer: No, except we settled every six months, and how it was settled he knows better than I do.

190th Cross-Interrogatory: This money you had to make these trips to carry on these negotiations with creditors in 1904 you made as manager for the trustees; that is the time you were getting $500.00 a month, wasn't it?

Answer: I didn't charge any time; I charged only expenses in the year 1904.

191st Cross-Interrogatory: That money you got from your salary as manager for the trustees in bankruptcy?

Answer: I got salary for eleven months, I believe.

192nd Cross-Interrogatory: Wasn't it thirteen months at $500.00 a month you got?

Answer: All right.

193rd Cross-Interrogatory: And some of that is what you used to meet this expenditure of $250.00?

Answer: I had some money.

194th Cross-Interrogatory: You were insolvent at that time, were you not?

Answer: Yes, that is all the money I had then; my wife had some money.

195th Cross-Interrogatory: You paid that, I believe you testified, out of your own funds?

Answer: Yes, sir.

196th Cross-Interrogatory: These items in your Exhibit "A," such as to H. M. Meloney, $20.55, that is for copies of papers?

Answer: Yes, sir, for copies of papers Mr. Hall required from Parkersburg.

197th Cross-Interrogatory: And the same is true as to T. A. Brown, Referee?

Answer: Yes, sir.

198th Cross-Interrogatory: And Mr. C. H. Wright, expense to Pittsburgh, $36.50, he was another witness you took along and didn't use; is that right?

Answer: Yes, sir; he was summoned but Mr. Hall didn't call him.

199th Cross-Interrogatory: Do you charge up in here the half of that $125.00 check that you paid Mr. Bray for half of the fee paid to Mr. Frey and shown in his credit of September 9, 1907?

Answer: I don't know anything about it.

Exhibit "A"—Eichel.

EXPENSE ON ACCOUNT OF THE PURCHASE OF MATERIAL CLAIMS FROM THE CREDITORS OF THE EVANSVILLE CONTRACT CO.—BANKRUPT.

May	20, 1907—C. D. Dotson	$ 30.00
July	27, 1907—W. M. Hall	112.00
Sept.	21, 1907—Hall & Metcalf	35.00
Sept.	23, 1907—P. W. Frey	45.70
Feb.	17, 1908—W. M. Hall	190.00
Sept.	7, 1908—W. M. Hall	50.00
Dec.	8, 1908—J. D. Milan	17.90
Mch.	3, 1910—J. D. Milan	17.50
May	5, 1910—J. D. Milan	15.30
Dec.	19, 1910—J. D. Milan	19.50
Dec.	21, 1910—J. D. Milan	4.50
Aug.	3, 1912—J. Eichel—Expense	37.50
Aug.	20, 1912—M. J. Bray—Expense	5.10
Aug.	22, 1912—J. Eichel—Expense	25.00
Oct.	14, 1912—J. Eichel—Expense	30.00
Oct.	23, 1912—T. A. Brown, Referee	34.26
Nov.	9, 1912—J. Eichel—Expense	5.00
Apr.	10, 1913—J. Eichel—Expense	114.00
Apr.	12, 1913—C. D. Dotson	29.80
Apr.	10, 1913—R. J. Armstrong	35.00
Apr.	10, 1913—William Eichel—Expense	35.00
Apr.	17, 1913—C. H. Wright—Pittsburgh	36.50
Apr.	26, 1913—P. W. Frey—Pittsburgh	43.80
May	10, 1913—T. A. Brown, Referee	5.00
June	14, 1913—J. Eichel—Expense	75.00
Jan.	5, 1914—C. D. Dotson	10.00
Feb.	21, 1914—H. P. Camden	75.00
Apr.	20, 1914—C. H. Wright—Expense	18.45
Dec.	21, 1914—H. M. Meloney	20.55
Dec.	26, 1914—C. D. Dotson	10.00
		$1,182.36

At the execution of a commission to take testimony, between United States Fidelity & Guaranty Company, a corporation of the State of Maryland, plaintiff, and Laura Eichel, Madison J. Bray and Philip W. Frey, defendants, this paper was produced and deposed unto by Jacob Eichel at the time of his examination.

ADOLPH F. DECKER,

Commissioner—Notary Public.

Deposition of M. J. Bray.

FILED AUGUST 21, 1916

1st Interrogatory: Starting with the year 1907, what, if any, expenses have you paid or has Laura Eichel paid out under your supervision in and about the litigation of these so-called material claims now in litigation in this suit, being the claims upon which she has sued the plaintiff at Pittsburgh? Give a list of these expenses and their dates of payment, and state for what services or expenses they were. Who has paid them? Are there any bills outstanding and unpaid or for attorney's fees in and about the litigation with the plaintiff upon those claims, and if so, to whom are such bills or with whom have they been incurred, and what are they? What effect will they have on the amount of money received on said claims?

Answer: I hand you a list of such payments and ask that it be made a part of my deposition and marked Exhibit 1. They are all connected with this suit. I have paid them. I know of no bills unpaid except what is due Mr. Hall. Mr. Hall's fee will have to come out of it. It will come out of us.

2nd Interrogatory: Where do you reside?

Answer: Evansville, Indiana.

And now said witness is orally cross-examined by Mr. William E. Schoyer, of counsel for plaintiff, as follows:

3rd Cross-Interrogatory: Has Mr. Hall rendered you any bill?

Answer: No, sir.

4th Cross-Interrogatory: All you know, then, is what Mr. Eichel has testified, and you know the litigation is uncompleted at Pittsburgh?

Answer: Yes, sir.

5th Cross-Interrogatory: Taking up this list of claims, this item of September 9, 1907, Frey, attorney fee, $250.00; in what connection was that fee paid?

Answer: His work that he done for Mrs. Eichel in purchasing these claims, advice and so forth.

6th Cross-Interrogatory: Was that for work in 1904 in the actual purchase of the claims? Is that right?

Answer: I can't say. That is 1907, isn't it?

7th Cross-Interrogatory: The date is September 9, 1907.

Answer: I don't know; that wasn't in the purchase of claims.

8th Cross-Interrogatory: Was he paid $250.00 or some such amount for the purchase?

Answer: Not by me.

9th Cross-Interrogatory: Had you paid Mr. Frey anything before 1907?

Answer: Not that I know of.

10th Cross-Interrogatory: You don't remember?

Answer: No, sir.

11th Cross-Interrogatory: You don't know what actual expense this was on September 9, 1907?

Answer: I can't say exactly; I think it was in connection with the suit held at Wheeling, but I wouldn't be certain.

12th Cross-Interrogatory: That is the first item you recall paying Mr. Frey?

Answer: Yes, sir.

13th Cross-Interrogatory: You paid him nothing before that?

Answer: No, sir.

14th Cross-Interrogatory: This item to Mr. Hall, November 5, 1907, $300.00; in what connection was that paid?

Answer: In connection with this suit.

15th Cross-Interrogatory: With the suit in Pittsburgh?

Answer: In connection with this business.

16th Cross-Interrogatory: Did you retain Mr. Hall originally, or did Mr. Eichel?

Answer: I think we were together when we retained him.

17th Cross-Interrogatory: And that was shortly after the bankruptcy, I suppose, in Pittsburgh?

Answer: Yes, sir.

18th Cross-Interrogatory: And he originally looked after securing proper assignment of some of these claims in Pittsburgh; is that correct?

Answer: I don't think he did; I think Mr. Dupuy looked after that.

19th Cross-Interrogatory: Now the Pittsburgh claim owners, didn't Mr. Hall look after those?

Answer: He may have, I don't know; I didn't have much to do with the management of it.

20th Cross-Interrogatory: Now this item of November 9, 1907, J. A. Dupuy, $50.00; he had nothing to do with the suits in Pittsburgh, did he?

Answer: No, sir.

21st Cross-Interrogatory: And on November 22, 1907, J. A. Dupuy, $200.00, what was that for?

Answer: That was for the suit in Wheeling.

22nd Cross-Interrogatory: That had nothing to do with the suit in Pittsburgh?

Answer: No, sir.

23rd Cross-Interrogatory: And F. A. Lee, November 22, 1907, $8.00; who is that?

Answer: Mr. Dupuy's stenographer.

24th Cross-Interrogatory: October 3, 1907, expense to Pittsburgh, $34.58. Do you remember the occasion of that?

Answer: I went up to see Mr. Hall, I think, from Wheeling.

25th Cross-Interrogatory: April 6, 1908, expense to Pittsburgh, $38.46; do you know what that was for?

Answer: To consult with Mr. Hall.

26th Cross-Interrogatory: Do you know whether it was about these matters?

Answer: Yes, sir.

27th Cross-Interrogatory: Had you any other matter at all with Mr. Hall?

Answer: None at all.

28th Cross-Interrogatory: April 9, 1908, William M. Hall, attorney, $350.00; that was on account of these suits?

Answer: Yes, sir.

29th Cross-Interrogatory: April 23, 1908, William M. Hall, attorney, $300.00; that was also on account?

Answer: Yes, sir.

30th Cross-Interrogatory: Mr. Hall was also in that original case at Wheeling, was he not, Mr. Bray?

Answer: Yes, sir.

31st Cross-Interrogatory: And part of these fees were on account of that litigation?

Answer: Yes, sir.

32nd Cross-Interrogatory: And this item of May 18, 1908, J. A. Dupuy, attorney, $50.00; that is on account of the Wheeling matter?

Answer: Yes, sir.

33rd Cross-Interrogatory: And November 16, 1911, J. Eichel for Hall, attorney, $200.00; that is you paid Mr. Eichel to give that amount to Mr. Hall?

Answer: Yes, sir.

34th Cross-Interrogatory: And on July 25, 1911, expense to Pittsburgh, $12.60; whose expense was that?

Answer: Mine; I went up there from Parkersburg.

35th Cross-Interrogatory: August 31, 1911, expense to Parkersburg, $43.60; you were going to Parkersburg as trustee, were you not?

Answer: No, sir, not at that time; it was to consult with Mr. Camden.

36th Cross-Interrogatory: These items in March, 1913, March 10, 11 and 18, were all in connection with the trial in Pittsburgh?

Answer: Yes, sir.

37th Cross-Interrogatory: And what is this item of March 21, 1913, H. P. Camden, attorney, $125.00? He had nothing to do with the suits in Pittsburgh, did he?

Answer: No, sir, but there was another suit kind of mixed up together, and we consulted him with the others.

38th Cross-Interrogatory: You consulted him with reference to the suit in Pittsburgh and paid him $125.00?

Answer: Yes, sir.

39th Cross-Interrogatory: March 8, 1915, William M. Hall, attorney, $72.25; is that an expense or fee?

Answer: An expense.

40th Cross-Interrogatory: And March 27, 1915, William M. Hall, attorney, $150.00; that is a fee, I suppose?

Answer: Yes, sir.

41st Cross-Interrogatory: April 13, 1915, D. Casto, attorney, $5.00; who is he?

Answer: He is a clerk of court, I believe.

42nd Cross-Interrogatory: Where?

Answer: At Pittsburgh, or he may be at Wheeling; I don't remember where he is; it was for some copy he made for Hall.

43rd Cross-Interrogatory: October 7, 1915, Camden, attorney, $59.00; what is that for, Mr. Bray? That is in connection with the Fourth Circuit, isn't it?

Answer: Yes, sir; I think he went up to see Hall at that time.

44th Cross-Interrogatory: February 12, 1916, expense to Pittsburgh, $45.53; that was for a consultation with Mr. Hall?

Answer: Yes, sir, Mr. Hall sent for me.

45th Cross-Interrogatory: And those were the expenses incurred by you beginning with the year 1907?

Answer: Yes, sir.

46th Cross-Interrogatory: I notice on the back of this sheet, credit, September 9, 1907, J. Eichel, $125.00; that was one-half of the original fee you paid Mr. Frey of $250.00, wasn't it?

Answer: It may have been that he gave me a check for that and I gave him credit for it.

47th Cross-Interrogatory: Is Mr. Eichel supposed to share these fees?

Answer: What is that?

48th Cross-Interrogatory: Is Mr. or Mrs. Eichel supposed to pay anything on account of these fees?

Answer: They are to come out of the proceeds of the litigation. She ought to have paid them all, I suppose, it is her suit, but she didn't.

49th Cross-Interrogatory: This money has all been paid from your own funds, has it?

Answer: Yes, sir.

50th Cross-Interrogatory: Are there any fees for any of these attorneys contingent upon the result of this litigation?

Answer: No, sir.

51st Cross-Interrogatory: I would like to ask you, Mr. Bray; who are the attorneys representing you in this suit against the Eichels?

Answer: Walker & Walker.

52nd Cross-Interrogatory: I would like to ask you also—has interest been paid on this $27,000.00 note?

Answer: The interest has been settled for up until the 30th day of June, 1914, I think.

53rd Cross-Interrogatory: Who settled for it?

Answer: We just simply made a settlement, with Mr. Eichel and Leslie and Mrs. Eichel, and every six months we settled up the interest and they would give me a check or a note or whatever it was.

54th Cross-Interrogatory: Who would give you the check or the note?

Answer: The Ohio River Contract Company.

55th Cross-Interrogatory: Are you interested in that at all?

Answer: I was the treasurer; I had no stock in it; I lent it a good deal of money.

56th Cross-Interrogatory: And your interest on the note would be paid out of the funds of that company in which all the Eichel family held stock; is that the way it was done?

Answer: Yes, sir, it was paid that way, and then they made their different charges around.

57th Cross-Interrogatory: You would get a check, I suppose, from the Contract Company which included the interest?

Answer: Yes, sir, either a check or note; it was settled some way up to that time.

58th Cross-Interrogatory: Who were the stockholders in that company, Mr. and Mrs. Eichel and their sons?

Answer: I only know one stockholder—Jacob Eichel.

59th Cross-Interrogatory: Is he the principal stockholder?

Answer: Yes, sir.

60th Cross-Interrogatory: Do you know how much stock Mrs. Eichel had?

Answer: No, sir.

61st Cross-Interrogatory: This item to Referee Brown, February 21, 1916, $3.00, that is just for a paper, I suppose?

Answer: Yes, sir.

62nd Cross-Interrogatory: And the item of May 1, 1916, to Mr. S. Lewis, Clerk, is also for a paper?

Answer: Yes, sir.

Exhibit 1—Bray.

MRS. LAURA EICHEL TO M. J. BRAY, DR.

The following items are for expenditures on account of the purchase of the claims from the creditors of the Evansville Contract Co., Bankrupt.

Sept.	9, 1907, to Frey, Atty, Fee	$ 250.00
Nov.	5, 1907, to Wm. M. Hall, Atty	300.00
Nov.	9, 1907, to J. A. Dupuy, Atty	50.00
Nov.	22, 1907, to J. A. Dupuy, Atty	200.00
Nov.	22, 1907, to F. A. Lee, Sten	8.00
Nov.	22, 1907, to Expense to Wheeling, W. Va	55.00
Oct.	3, 1907, to Expense to Pittsburgh, Pa	34.58
Apr.	6, 1908, to Expense to Pittsburgh, Pa	38.46
Apr.	9, 1908, to Wm. M. Hall, Atty	350.00
Apr.	23, 1908, to Wm. M. Hall, Atty	300.00
May	18, 1908, to J. A. Dupuy, Atty	50.00
Nov.	16, 1911, to J. Eichel for Hall, Atty	200.00
July	25, 1911, to Expense to Pittsburgh	12.60
Aug.	31, 1911, to Expense to Parkersburg, W.Va.	43.60
Mch.	10, 1913, to Expense to Pittsburgh, Pa	125.25
Mch.	11, 1913, to Ref. Johnson to Pittsburgh	75.00
Mch.	11, 1913, to F. J. Reitz to Pittsburgh	25.00
Mch.	18, 1913, to L. D. Jarvis, Court Sten	85.00
Mch.	21, 1913, to H. P. Camden, Atty	125.00
Mch.	8, 1915, to Wm. Hall, Atty	72.25
Mch.	27, 1915, to Wm. Hall, Atty	150.00
Apr.	13, 1915, to D. Casto, Atty	5.00
Oct.	7, 1915, to Camden, Atty	59.00
Feb.	12, 1916, to Expense to Pittsburgh	45.53
Feb.	21, 1916, to Ref. Brown	3.00
May	1, 1916, to S. Lewis, Clerk—Phila	10.00
		$2,672.27

CREDITS.

Sept.	9, 1907, by J. Eichel.....	125.00
May	1, 1916, by Evansville Sand & Gravel Co..	5.00
		$ 130.00

At the execution of a commission to take testimony, between United States Fidelity & Guaranty Company, a corporation of the State of Maryland, plaintiff, and Laura Eichel, Madison J. Bray and Philip W. Frey, defendants, this paper was produced and deposed unto by Madison J. Bray at the time of his examination.

ADOLPH F. DECKER,

Notary Public—Commissioner.

Objections to Issuance of Commission to Take Testimony of Eichel and Bray, and Exceptions to Interrogatories.

FILED JULY 21, 1916

United States Fidelity & Guaranty Company, plaintiff above named, objects to the issuance of a commission upon interrogatories to take depositions on behalf of the defendants for the following reasons:

FIRST. The said defendants were also appellees in an appeal to the Circuit Court of Appeals at No. 1850 October Term, 1914, as a result of which appeal the decree of the lower Court was reversed and costs awarded to appellant. A bill of costs has been filed by the appellant amounting to the sum of $790.83, and demand has been made upon counsel for the appellees to pay these costs as ordered by the mandate of the Circuit Court of Appeals, and said demand has been refused. The plaintiff therefore, avers that all proceedings upon the proposed commission should be stayed until said costs are paid.

SECOND. There is no order of Court providing for the commission, as required under Rule 47 of the Equity Rules.

Your petitioner further excepts to the Third and Fourth Interrogatories addressed to Jacob Eichel and to the Interrogatories addressed to M. J. Bray for the following reasons:

FIRST. There is nothing in the pleadings of this case which raises any question as to any of the matters sought to be adduced by the said Interrogatories.

SECOND. Under the mandate of the Circuit Court of Appeals the testimony sought to be adduced by the said Interrogatories is incompetent, irrelevant and immaterial

and constitutes such testimony as cannot be permitted under said mandate.

THIRD. The appellees filed a petition in the Circuit Court of Appeals, which was heard May 22, 1916, in which they asked said Court for leave to take further testimony in the District Court, inter alia, upon the same subject matter as is indicated by the said interrogatories, excepted to. This petition was refused by said Court on the 20th day of June, 1916.

Wherefore the said interrogatories should be stricken out.

UNITED STATES FIDELITY & GUARANTY COMPANY,

By Wm. E. Schoyer,
Attorney.

July 25, 1916.

August 31, 1916, upon consideration of the exceptions to the within rule and interrogations, the same are, after argument by counsel for each party, overruled and the commission is ordered to issue or set out in the rule to Adolph P. Decker, the plaintiff may file cross-interrogatories within five days herefrom or be present before the Commissioners at vansville, Indiana, and orally examine and cross-examine the witnesses, on Wednesday, August 16, 1916, at 10 o'clock A. M.

All questions as to the relevancy or materiality of the evidence to be produced are reserved until same may be offered at the hearing. PER CURIUM.

Eo die solicitors for plaintiff except to above order and at their instance exception noted. CHAS. P. ORR,
Judge.

Petition of Plaintiff of July 1, 1915, in the District Court of the United States for the Northern District of West Virginia.

TO THE HONORABLE ALSTON G. DAYTON, JUDGE OF THE DISTRICT COURT FOR SAID DISTRICT:

The United States Fidelity & Guaranty Co. respectfully shows:

FIRST. That it is the same person who has heretofore filed petitions in this cause, and was the surety of the Evansville Contract Co. before its bankruptcy on four bonds aggregating $200,000.00, the facts in relation to which are more fully set out in an amended petition filed on or about the 12th day of July, 1912, referred to as part hereof.

SECOND. Upon proceedings duly had on that petition before the Honorable Thomas A. Brown, Referee in Bankruptcy, to whom this matter had been referred, it was adjudged by an order made on the 4th day of January, 1913, that all of the funds belonging to the bankrupt estate, and all of the assets of the bankrupt estate then undistributed, were subject to a lien in favor of your petitioner, and that all claims for material or labor having recourse on your petitioner's bonds or any of them, were entitled to first satisfaction out of the funds in the hands of the court and assets unadministered; and it was further adjudged and decreed that certain claims more specifically stated below which had been purchased by M. J. Bray, Trustee in Bankruptcy, in connection with Jacob Eichel or Laura Eichel, or both at a discount, were not entitled to be allowed at amounts greater than the actual cost, with interest thereon for the claims respectively, and that certain premiums due and unpaid to your petitioner should be paid out of the fund.

The decree of the Referee of January 4, 1913, is shown by the printed record on the appeal of M. J. Bray and

others against your petitioner No. 1260 in the Circuit Court of Appeals for the Fourth Circuit made part hereof, at page 169 and following.

Whereby it was ordered and decreed that the fund in the hands of M. J. Bray, Trustee of the Bankrupt, should be applied as follows:

1. To the payment of cost and expenses of administration then unpaid, including unpaid premiums due your petitioner amounting to $1,150.

2. That the remainder of the funds should be applied to the discharge of these so-called preferred claims, that is such as would under the law have recourse on the four bonds of your petitioner, but that such of the claims having recourse on your petitioner's bonds as had been purchased by Jacob Eichel or Laura Eichel in connection with the said Bray, should be allowed only at the amounts for which they were severally purchased, and not at their face value.

That decree found that there was in the hands of the trustee as of the 29th day of July, 1912, the sum of $38,055.40 belonging to the estate, out of which there should be paid certain costs and expenses, and that out of those funds at this time, there should be disbursed the sum of $34,378.02 and to retain the remainder until further orders; and thereupon a dividend was ordered to be paid at 66 2-3 per cent. on the preferred claim aggregating for dividends $34,378.02, and it was decreed "that M. J. Bray, Trustee, do pay to the several claimants as preferred debts a dividend of 66 2-3 per cent. as follows to-wit:

	Amt. Claim	66 2-3 Div.
D. A. Rardin, Athens, O., Amount of claim, $327.00, Int. from Feb. 25, 1904, $173.64, total.....	$ 500.64	$ 333.76
Duncan & Porter Co., Allegheny, Pa...	556.65	371.10
Riter-Conley Co., Pittsburg, Pa., Amount of claim, $4,858.25, Int. from March 18, 1904, $2,561.....	7,419.36	4,946.24

The Parkersburg Mill Co., Parkersburg, W. Va.	6,789.84	4,526.56
The Monongahela R. C. C. & C. Co., Pittsburgh, Pa.	3,466.97	2,311.31
Pittsburg Trolley Pole Co., Pittsburg, Pa., Amount claim, $634.20, Int. from Feb. 24, 1904, $336.87, total..	971.07	647.38
The Nicola Brothers Company, Amt. claim, $1,199.77, Int. from Dec., 1903, $653.48, total	1,853.25	1,235.50
C. D. Dotson, Parkersburg, W. Va.	2,679.65	1,786.43
C. C. Martin & Co., Parkersburg, W. Va.	499.67	333.11
The Variety Iron Works, Cleveland, O.	8,904.79	5,936.53
E. L. Oles, Pittsburg, Pa.	200.93	133.95
Southeastern Lime & Cement Co., Charleston, S. C.	3,743.26	2,495.51
Clydesdale Stone Co., Pittsburg, Pa..	5,461.73	3,641.15
Withers & Vandevender, Parkersburg, W. Va.	4,222.24	2,814.83
E. K. Neal, Ben Lomond, W. Va.	1,421.38	947.59
Lombard Iron Works, Augusta, Ga..	2,397.29	1,598.19
Kramer & Son, Parkersburg, W. Va.	478.31	318.88

"It further appearing to the court that the following are held by M. J. Bray as collateral security for certain indebtedness due him from Laura Eichel, and that he holds an order for the payment of said claims to himself, as follows, to-wit:

Claims held by M. J. Bray.	66 2-3 %Div.
Lombard Iron Works	$1,598.19
Variety Iron Works	5,936.53
Clydesdale Stone Co.	3,641.15
C. D. Dotson	1,786.43
The Monongahela R. C. C. & C. Co.	2,311.31
The Duncan Porter Co.	371.10
Withers & Vandevender	2,814.83

E. L. Neale	947.59
E. L. Oles	133.95
S. E. Lime & Cement Co.	2,495.51
C. C. Martin & Co.	333.11
Kramer & Co.	318.88
Parkersburg Mill Co.	4,526.56

"It is therefore ordered that the dividends on said several claims provided for in this order, be paid to M. J. Bray, or his attorney, and it is further ordered that the dividends on the other claims herein provided for be paid direct to the claimants or to their attorneys of record."

THIRD. Jacob Eichel, Laura Eichel, M. J. Bray and others filed a petition to review that decree of Jan. 4th, 1913, and the same was submitted for review, and a petition for review was allowed on the 8th day of January, 1913 (Printed Rec. p. 193), in order that the Referee's decree might be reviewed by the Honorable Judge of the District Court for said District, and it was further ordered that M. J. Bray, Trustee, suspend payment of the several amounts directed to be paid by the said order of Jan. 4th, 1913, until the further order of the court. (Printed Rec. 194.) On January 8th, 1913, the petition for review of the order of Jan. 4th, 1913, was filed by Jacob Eichel, Laura Eichel and M. J. Bray before the Hon. A. G. Dayton, Judge of said District Court. (Rec. p. 439.)

On the 10th day of December, 1913, the Honorable District Judge affirmed the decree of the Referee and dismissed all the petitions to review the same, including that of J. C. Thomas, Alexander Gilchrist, and Tessie Lowenthal, Printed Record p. 493, filing a written opinion p. 489.

FOURTH. That decree of the District Judge was taken upon appellate proceedings to the U. S. Circuit Court of Appeals, for the Fourth Circuit and was there affirmed by decree and decision entered on the 7th day of December, 1914, in the said Circuit Court of Appeals, and subsequently

on the 9th day of January, 1915, an appeal was allowed by the Hon. Martin A. Knapp, one of the Judges of the Court of Appeals, from the decision of that court, to the Supreme Court of the United States upon a bond in the penalty of $500.00, which bond was given for the costs of the appeal and not for supersedeas, and the appeal has been allowed and has taken effect without supersedeas; so that the decrees and orders made by the Referee and the affirmance thereof made by the District Court and by the Circuit Court of Appeals still stand in full force and effect, and no order or decree thereafter made has been superseded or in any manner impaired. That cause is now on the Docket of the Supreme Court, as No. 821, of October Term 1914.

FIFTH. The mandate of the Circuit Court of Appeals has been issued and sent down recently and nothing now stands in the way of the immediate execution and distribution of the funds in the registry of this court, in accordance with the Referee's decree of January 4th, 1913. The fund in the hands of the court is loaned at only 3 per cent interest.

SIXTH. There has been no distribution whatever, either to general or lien creditors in this cause, and it is still competent to review and to re-hear any claim heretofore passed upon.

SEVENTH. At the time that the adjudication was made in this cause on the fourth day of January, 1913, directing a dividend to be made including a payment of 66 2-3% upon all those certain claims known as the preferred claims, meaning thereby those that have arisen out of the indebtedness for material or labor and having recourse on bonds given by the contractor—there were pending in the Federal Court for the Western District of Pennsylvania a number of suits based on claims for labor and material, wherein Laura Eichel, as assignee, was plaintiff, and your petitioner was defendant; and also a suit in equity brought by your petitioner to stay that multiplicity of suits, to defend against numerous claims and to purge the same of the

profit sought to be realized by Bray and others from the discount thereof, which claims are substantially the same mentioned above. By proceedings there had in the District Court for the Western District of Pennsylvania, it was by decree entered on the 20th day of December, 1913, decreed that all of those several claims should be paid in full at their face value; but an appeal was taken from that decree, to the Circuit Court of Appeals for the Third Circuit sitting at Philadelphia, and thereafter on or about the 3d day of February, 1915, an opinion and decree were filed by the said Circuit Court of Appeals of the United States which did reverse and annul the decree and the judgments aforesaid made and entered by the said District Court for the Western District of Pennsylvania, 219 Federal Rep. 803; and the said Circuit Court of Appeals, in reversing said decree, did concur and agree in its findings and conclusions with the several decisions that had been entered in the District Court for the Northern District of West Virginia, and in the Circuit Court of Appeals for the Fourth Circuit with regard to the disability of said Bray and Eichels to realize a profit in purchase of any such claims, and the said Circuit Court of appeals for the Third Circuit did further adjudge and decree that the two certain claims of the Nicola Bros. Co. of Pittsburgh, amounting to $1,199.77 and the Trolley Pole Co. amounting to $634.20 upon each of which suits had been brought in Pittsburgh in the name of the said Laura Eichel —should not be allowed at more than actual cost when proved.

EIGHTH. And that the alleged claim of Laura Eichel as assignee of Clydesdale Stone Company for $6,185.35 should not only be reduced to actual cost; but that as your petitioner was not liable except for material furnished to Dam No. 3 and Dam No. 5, and as the claim covered many items for which your petitioner was not liable, and large payments had been made, which should have been credited against material furnished to Dams No. 3 and 5; therefore, such payments should be applied to the older claims, according to

their date. Your orator shows that this decision in effect covers all claims referred to so far as concerns this petitioner, changing the principal sums of Trolley Pole Co. $634.20, and of Nicola Bros. Co. $1,199.77 by eliminating not less than 15% and reducing them to actual cost, and that the claim of Clydesdale Stone Co. covers less than $1,350 of material chargeable to your petitioner's liability out of $5,967.23 of claim of Clydesdale Stone Co., for which Bray and Eichel paid $3,606, or 60%, which would limit recovery on this claim as to your orator, to 60% of $1,350 or $810.00 instead of $3,606; and these amounts should be adjusted. The said claims of The Trolley Pole Co. and of Nicola Bros. Co. were acquired by said Jacob Eichel, but were fradulently assigned to his wife, Laura Eichel upon no consideration and are the property of said Jacob.

NINTH. From the said decree of the U. S. Circuit Court of Appeals for the Third Circuit at Philadelphia, an appeal was taken by Laura Eichel, Bray, Trustee, and W. P. Frey to the Supreme Court of the United States on the ..... day of February, 1915, and the record was filed in the Supreme Court and docketed as No. 872; and thus the decisions in the several proceedings above mentioned, all of which have been in favor of your petitioner, are now pending in the Supreme Court of the United States, and meantime, nothing stands in the way of the distribution of the funds in the court of bankruptcy, under the said decree of January 4, 1913, except as to the claims of Trolley Pole Co., Nicola Bros. Co. and Clydesdale Stone Co., which should be reduced to amounts actually paid therefor, subject to all proper credits.

TENTH. As shown by the record, that fund amounts to about $38,000, and is subject to some deductions for co[illegible]ut it stands on deposit in Banks which pay only 3% and many of these debts are running at the rate of 6 per cent. which has already made a loss of 3 per cent. for ten years; and all such loss of interest has been caused by the delays and wrongful action of said Bray and Eichel and

should be charged to them, and should be made good to the funds and estate of the Bankrupt.

ELEVENTH. On the 18th day of September, 1912, an action was brought in the District Court for the Western District of Pennsylvania in the name of the Nicolette Lumber Co., a corporation, against your petitioner, and judgment was rendered thereon for the sum of $1,065, amounting with costs on the 30th day of November, 1912, to $1,097.32. Your petitioner was obliged to pay it and the said judgment was on that day paid by your petitioner, and the cause of action and ground of recovery was for materials furnished to the bankrupt, under a bond of your petitioner, dated November 13, 1900, upon the contract for building of Lock No. 2, Big Sandy River, as by the record shown; but that claim had never been set up or proven in bankruptcy, and your petitioner's counsel in the bankruptcy matters knew nothing about it, and it is not included in the list of claims marked as allowed and decreed as preferred, under the order in bankruptcy of November 19, 1914, nor has it been listed at all as a claim against the estate of the bankrupt; but your petitioner is entitled to have the same paid along with the other material claims for which it became liable and equally with the cost price of claims held by said Bray and assigned to Laura Eichel, out of the funds of the bankrupt estate, and as a lien thereon.

THE LIENS AND RIGHT OF RECOVERY AND AMOUNTS.

TWELFTH. Your petitioner has valid claims justly recoverable from the estate of the bankrupt and from the Trustee and a lien on assets as heretofore decreed, and from the seven respective banks that executed the bond of indemnity dated on the 4th day of April, 1904, and delivered on or about the 11th day of April, 1904, whereby said banks covenanted to indemnify and save harmless your petitioner from all loss, charge, damage, and liability theretofore or thereafter accruing, as follows:

1. By the judicial contract and decree of April 11, 1904 (last paragraph), the court and creditors agreed and ordered that the trustees fully and completely release and save harmless your petitioner as a surety on the said contracts of the bankrupt.

2. By the indemnity given by the banks, they as indemnitors agreed to indemnify against all loss, charge, damage and liability theretofore accrued or thereafter accruing by reason of your petitioner's suretyship or liability on said four bonds.

3. By the conventional lien and agreement of indemity given by the bankrupt.

4. By the equitable lien credited by the bonds.

5. The just claims of your petitioner cover and include all those heretofore set up in prior petitions and mentioned in the decree of January 4, 1913, made by the Referee in Bankruptcy amounting at cost of nearly $51,000, and includes further (a) the said judgment in favor of Nicolette Lumber Co. paid by your petitioner for the sum of $1,097.32, with interest from November 30, 1912. (b) All the expenses of litigation and of costs necessarily incurred and expended in the several proceedings mentioned, the actual expenditures heretofore made being for the amount of $4,057.75, a statement of which is hereto annexed marked Exhibit "Expenditures," with interest thereon from the date the same were paid. (c) Further charges for fees and compensation of counsel and other persons employed in the necessary protection of the rights of your petitioner, and other creditors of like class and situation a further sum not less than $12,777.65.

THIRTEENTH. The total liabilities and expenses necessarily incurred and made and the loss, damage and charges of your petitioner on account of its suretyship, and which is necessary to indemnify your petitioner, thus exceed the sum of $68,000.00 as shown by statement attached as part hereof, marked Statement of Claims for Indemnity.

The fund in the registry as stated by the record as of July 29, 1912, was about $38,000 while the amount necessary to satisfy your petitioner's liabilities is about $68,000, and there will be a deficiency of at least $30,000.00 and so it is that the funds in the hands of the court will not be sufficient to pay the claims for which your petitioner is liable and which it has not yet satisfied, and much less will such fund cover these, and the many thousands of dollars which have been expended and incurred by it in protecting the rights of itself and others from the frauds and wrongs growing out of the breaches of trust, and the fraudulent conduct of the said M. J. Bray, the Trustee, and Jacob Eichel in the cheating and defrauding of creditors in the name of Laura Eichel; and your petitioner charges, that all of the costs, expenses and expenditures laid out and incurred and paid by your petitioner from and after the .... day of January, 1906, were necessarily incurred and caused by the wrongful and fraudulent acts and conduct of the said Bray and the said Eichel, and by their breaches of trust; and would not have occurred had it not been for their inequitable and unconscionable attempts to defraud your petitioner, in attempting to divert the funds upon which material and labor claims had a lien, in speculating on such claims under secret trusts and breaches of trust among themselves, in causing litigation that has extended over ten years, a great loss of interest. The petitioner is entitled to recover of the seven banks obligors on said Bond of Indemnity dated April 4, 1904, whatever amounts may be required to save it harmless, according to the terms thereof, and each of said banks has been duly notified of all the several proceedings in this court, and in the said District Court of the United States for the Western District of Pennsylvania, and are bound by the several decisions made as herein referred to.

FOURTEENTH. *Trustees have appropriated claims belonging to the Bankrupt aggregating over $20,000 net cash, out of which only $6,500 has been accounted for of moneys adjudi-*

cated and paid under judgments rendered by the United States Court of Claims.

Your petitioner has recently discovered, in the month of January, 1915, and before the decisions of the courts of appeal became effective, that the said M. J. Bray and the said Jacob Eichel, by fraud and collusion, and in violation of their express trusts—the said Bray as official Trustee in Bankruptcy, and the said Eichel, as special agent employed by the creditors at the great salary of five hundred dollars per month and expenses, to prepare, present, and try the several claims of the Bankrupt against the United States, pending in the Court of Claims, as shown by the order of April 11, 1904—have conspired, and have taken and appropriated a sum running into thousands of dollars, in abuse of the trusts and confidence reposed in them, and brought about under the form of pretended sale of claims in litigation, wherein the said M. J. Bray, Trustee, was actually substituted as plaintiff in each claim, and the said Eichel, as former manager and president of the Bankrupt, had fullest knowledge as to details.

None of these facts, showing fraud as stated below, were known to your petitioner, or to any of its agents or counsel until long after all of the litigation above mentioned had been pending, and after the proceedings above mentioned had reached the Circuit Court of Appeal of the said Third and Fourth Circuits, and had been argued therein; and your petitioner is advised and believes and charges that there has been no change of circumstances, no intervening rights or interests, and no ground whatever to bar or to preclude your petitioner by way of laches or otherwise, from relief against the frauds complained of and hereinafter mentioned.

Referring to the records in this cause, and especially to the records of the Referee herein, and made part hereof;—In a sworn Petition of M. J. Bray, Trustee, filed March 17th, 1904, it was stated (Record p. 85):

"Your petitioners represent that the work of the contract taken by this company since its organization has been under the control and direction of Jacob Eichel, the President of said Company, who has been general manager thereof in the fulfillment of the contracts now on hand; his services in that behalf are necessary and would be to the best interests of said creditors, and would conserve the assets of the Bankrupt and that these petitioners ought to have the power and authority to employ said Jacob Eichel in said behalf.

"And your petitioners further assert and represent that the preparation, presentation and trial of the claims of the Evansville Contract Company against the United States Government amounting to about $90,000.00 would be impossible without the aid, assistance and management of said Jacob Eichel, and that the best interests of said creditors require that he be retained by these trustees, not only for the completion of said contracts, but for the proper preparation, presentation and trial of said claims."

The said Jacob Eichel was appointed on Petition of the Trustees, by an order made on the 11th day of April, 1904, in these words (Record p. 93):

"And it is further adjudged, ordered and decreed that the said trustees may employ Jacob Eichel, Esq., the President of the said The Evansville Contract Company, Bankrupt, and heretofore the General Manager thereof, at a sum not to exceed five hundred ($500.00) dollars per month, and, in addition thereto, the necessary expenses of the said Jacob Eichel, in the discharge of his duties under such employment, to assist said trustees in the completion of the contracts mentioned in their said petition; and to prepare, present and try, for,

to and in the Court of Claims of the United States, the several claims of the said The Evansville Contract Company, Bankrupt, against the United States." Under this employment said Eichel was paid in salary $6,500.

The character, grounds and facts of these claims were known to Eichel, and had arisen under his management of the Bankrupt's affairs. He acted under their employment and was paid thousands of dollars, and during the time he was being so paid, under express trust, he was engaged in purchasing and speculating in claims against the estate.

On April 8, 1908, an order was entered, reciting that a meeting of the creditors should be called for the purpose of giving them an opportunity to consider the offer of Jacob Eichel to pay $5,000.00 cash, for all of the claims due to the Bankrupt Estate from the Government, pending in the Court of Claims at Washington, and it was ordered accordingly that a meeting of the creditors in that behalf be, and is called for the 29th day of April, 1908, notices of which meeting were accordingly issued and appear to have been sent by mail to such of the creditors as appeared in the list of creditors, and to the attorneys of record, the Bankrupt and the Trustees.

On April 29, 1908, due notice had been given of the meeting, and it was adjourned until next day.

On April 30, 1908, the meeting was held. Present, M. J. Bray, Trustee, and H. P. Camden, representing the Trustee and some of the creditors; Judge Blizzard and C. D. Merrick, representing several creditors; and, also, Jacob Eichel, and one C. D. Dotson, a creditor; no other creditors being present or represented * * * * * and then was called up for consideration, the propositions heretofore submitted by Jacob Eichel to the Trustee, Bray, to pay *five thousand* dollars for said claim, and thereupon the said Eichel submitted the following additional proposition in writing:

"In re Evansville Contract Co., Bankrupt,
In Bankruptcy.

"To the Referee, Trustee and creditor of the above estate:—

"I hereby offer the sum of $6,500 to be paid as hereinafter mentioned, and a release and receipt in full of all money due and claimed to be due me from said estate for services rendered, expenses incurred and money expended including the $700 for which bill has heretofore been rendered, in connection with the claims hereinafter mentioned and all suits for the collection of same, said $6,500 to be paid cash into this court, or as ordered by the Referee on the day that a decree of distribution of the funds to the credit of this proceeding is made, and entered by the Referee. The said claims are as follows:

"All the claims against the United States filed by the Evansville Contract Co. in the U. S. Court of Claims at Washington, and the claims of the Evansville Contract Co., against the Monongahela River Consolidated Coal & Coke Co. now pending in the U. S. Circuit Court of Appeals at Philadelphia, Pa., according to a list hereto attached.

Respectfully submitted,
April 30, 1908. JACOB EICHEL.

The claims referred to in said contract and as shown by the list attached thereto, are as follows:

Claim No. 22,954. Dam No. 6	$59,731.12
Claim No. 22,955. Coffer Dam No. 3	2,358.00

Subject to 25 per cent. of attorneys' fees of amount collected.

Claim No. 24,887, Big Sandy River	$66,177.70
Subject to 25 per cent. to J. C. Thomas	16,544.42
	$49,633.28

Subject to 20 per cent. of attorneys' fees.
Claim No. 24,886.

Lot No. 2	$1,005.15	
Lot No. 3	1,060.00	
Lot No. 4	2,500.00	
Valve Stem at No. 3	335.60	
Testing Iron	505.73	
		$ 5,456.48

Claim No. 24,884, penalty	$ 5,137.50
Claim No. 24,885, stone at dam No. 6	1,253.23
Claim No. 28,729, dam at Congaree river	1,639.59

Subject to 20 per cent. attorneys' fees of amount collected.

> "After having considered the said proposition, the creditors present, as well as the attorneys present representing sundry creditors (except Jacob Eichel who declined to vote on account of being an interested party) unanimously accepted said proposition, and directed the trustee to accept the said offer on the terms and conditions contained in said writing; and the court being of opinion, *that it is and will be the best interest of the estate to dispose of said claim on the terms named in said written proposition;* it is adjudged, ordered and decreed that said proposition and its acceptance by the creditors present and represented, be and the same is hereby confirmed and the trustee is hereby ordered and directed to execute to the said Jacob *Eichel a proper and legal assignment of the said claims,* the same to be without recourse, and on the terms set forth in the writted proposition of said Jacob Eichel, *the same to be executed and delivered to the said Eichel by the said Trustee* upon the payment of the sum of $6,500 by the said Jacob Eichel to the said M. J. Bray, Trustee."

Your petitioner, upon information charges, that at that meeting the said Eichel controlled more than a majority of the claims voting for said resolution.

At the time that proposition was offered, your petitioner was not present nor represented at said meeting and had no suspicion that any wrong would be attempted, but it has learned within the past few days, and prior thereto, that it was stated to the Referee, Hon. T. A. Brown, by the said M. J. Bray and by the said Jacob Eichel, prior to the 29th and 30th days of April, and on those days, that the claims were very doubtful, and could not be established without great difficulty, except that Bray about April 5, 1908, informed the Referee that judgments had been recently rendered, as more fully shown below, for about $9,000, subject to commissions which would make a net recovery of about $7,000. No information was given to your petitioner; no fair information was given to any creditor as to the value of any of said claims. On the contrary thereof the following facts were fraudulently concealed and misrepresentations were made in regard thereto for the benefit and advantage of the said Bray and Eichel, or both of them, whereby they appropriated to themselves, or to one of them, the sum of over Fourteen Thousand Dollars, belonging to the estate and assets of the said bankrupt, in manner following:

Long prior to the calling of the meeting of April, 1908, and on the 23rd day of March, 1908, judgments had been rendered in the said Court of Claims, on three of the identical suits and claims hereinabove mentioned; that is to say, No. 24,884, $5,137.50; No. 24,885, $1,032.10; No. 24,886, $3,555.50. Total, $9,725.10.

FIFTEENTH. The aforesaid three claims passed into judgments more than a month before the meeting of April 29th, and were valid, adjudicated claims as good as money, on March 23, 1908, aggregating $9,725.10, from which there should be deducted twenty per cent. for costs of collections; but subsequently, on the 4th day of May, 1908, five days after the order of April 30th, the Court of Claims entered

judgment on No. 24,887, in favor of Madison J. Bray, Trustee, for the sum of $8,972.20, and the said Bray, Trustee, and the said Eichel were dissatisfied with that judgment as being insufficient and unjustly small; and motions were filed to set aside and to amend findings; and thereafter on the 28th day of February, 1910, a judgment was rendered in favor of M. J. Bray, Trustee, for the sum of $14,381.90; and thereafter a further judgment was entered, in Claim No. 28,729 (Congaree) for $1,639.59, the total recoveries thus made were $25,746.57, out of which there should be allowed a commission to attorneys making a net recovery of over $20,000.00, which the said Bray and Eichel sought by fraud and deceit to obtain for the sum of $6,500.00. Not one dollar was paid for any of those claims, but more than two years after every dollar thereof had been collected, on the 29th day of July, 1912, the said Bray filed a report, stating that he held the "obligation" of Jacob Eichel for $6,500.00 pursuant to the order of April 30, 1908, the report stating that all assets have been converted into cash, except that obligation of Mr. Eichel.

It then developed that the so-called obligation was not in writing, and that while the order of April 30, 1908, required that none of these claims should be assigned until the money had been paid, yet in fact Eichel had absolutely paid nothing up to that date; and there is not anywhere any evidence of any assignment ever made to him of such claims. By the terms of said order no assignment could be made and no transfer of funds on account of such claims was or could be effective, until said sum of $6,500 should be paid, and at that time, to wit, on the 30th day of July, 1912, the whole of the amounts recovered by M. J. Bray, Trustee for the creditors, amounting to more than $20,000.00 net, with several years' interest, had been unaccounted for, and no intimation given that any part thereof had been received; but on said 30th day of July, 1912, the said Bray filed a supplemental report, and stated that the said sum of $6,500.00 had been paid to him in cash, and he reported same as a definite charge against himself, although his former report of the

day before alleged, that Eichel's obligation had not been reduced to cash. No intimation was given on July 29th, nor at any other time to any creditor that these judgments had been recovered or paid.

Your petitioner further shows that it did not know of the recoveries that had been made in the Court of Claims, until an examination was being made by Mr. Charles F. Wood, about the first of January, 1915, and he discovered the facts with regard to said proceedings and judgments in the Court of Claims, as shown below.

Your petitioner charges upon its best information and belief, that the order of April 30, 1908, should be set aside and annulled; and, further, that the order of July 29, 1912, so far as it tends to recognize, ratify, or to effect any sale to Eichel or to Bray of any or either of those claims, should be annulled, and set aside; and, further, that a decree should be entered against the said M. J. Bray and said Eichel for the restitution and accounting for the whole amount of each of those several judgments, subject to a credit of $6,500.00 as of the 29th day of July, 1912, being the date with which he had been charged with that amount, with interest from the respective dates of the receipt.

Your petitioner charges, upon its best information and belief, that the said Bray and Eichel violated their trusts with regard to these claims so pending in the Court of Claims and that the transaction was in fraud of the rights of creditors, and of the Estate of the Bankrupt; that the order of April 30th was obtained by fraudulent concealment of essential facts; that the sale had never become effective, even technically, on the 29th day of July, 1912, although $6,500.00 was on that day charged to the said Bray, without interest, and at that time a net amount from these claims on judgments recovered in favor of M. J. Bray, Trustee, and by him received with interest, exceeded $23,000.00; but that the said Bray did not, nor did said Eichel, then, or at any other time indicate to the court or creditors that such amounts had been received; while it was their duty to have informed the court and the creditors of the facts, and it was

a breach of trust on the part of said Bray to allow any arrangement to be made, whereby there should be charged to him out of the funds already in hand, the sum only of $6,500.00; and the said Bray, on said 29th day of July, 1912, well knew that the effect of that order was to give to the said Eichel, if not to the said Bray himself, the benefit of the difference between the amounts that had been recovered, and the sum of $6,500.00 that was paid in on the account thereof; it was his duty to protect the estate, and it was a breach of trust and fraud, to absorb these large sums without protest, or allow Eichel to appropriate same.

The petitioner now finds from the records of the said Court of Claims, that at the time the recoveries were made, and when the same were paid over, the said M. J. Bray was sole Trustee, although the proceedings were in the Court of Claims in the name of Madison J. Bray and others, Trustees in Bankruptcy of the Evansville Contract Co. against the United States, and that judgments were rendered, and accounts were paid on the several claims to Madison J. Bray, Trustee, and that the facts are shown by the following schedule, showing the number of the claim, the date of the judgment, the amount thereof, the number and date of the Government Warrants, of the payments, and the name of the payee; that is to say:

No. of	Date of Judgment	Amt. of Judgment	No. and date of Warrant	Name of Payee of Wt.
24884	Mch. 23-08	$ 5137.50	War. Wt. 3929 of Aug. 10-08	Madison J. Bray, Sale Trustee, etc.
24885	Do	1032.10	War. Wt. 3028 of Aug. 10-08	do do
24886	Do	3555.50	War. Wt. 3930 of Aug. 10-08	do do
24887	Feb. 28-10	14381.90	War. Wt. 1386 of July 14-10	do do
28729	June 6-10	1639.57	War. Wt. 6916 of Sep. 15-10	do do

On the 10th day of August, 1908, Warrants were issued for the first three judgments above named, amounting to $9,725.00 endorsed by the said M. J. Bray, Trustee, and were paid on the 18th day of August, 1908.

That on claim No. 24887, a Warrant was issued on July 14, 1910, and paid on July 21, 1910, in the sum of $14,381.90.

On claim No. 28729, a Warrant was issued on the 15th day of September, 1910, and paid September 23, 1910, making a total aggregate of $25,746.57.

The amounts paid August 17,

1908,	$9,725.10	
are subject to a commission of 20%, making net		$7,780.08
and interest thereon to July 29, 1912,		1,843.86
Amt. brought forward,		$9,623.94
On the money paid July 21, 1910,	$14,381.90,	
the commission was 25%, leaving net		10,786.43
and interest thereon to July 29, 1912		1,308.75
On money paid September 23, 1910,	$ 1,639.57	
the commission was 20%, leaving net		1,311.65
and interest thereon to July 29, 1912		145.60
Aggregate of principal and interest, July 29, 1912,		$23,176.37
On which there was charged to Trustees, as paid July 29, 1912,		6,500.00
This leaves the net amount after credits of		$16,676.37

For which the creditors received no consideration whatsoever, and for which the said Eichel and Bray should be required to account, and to pay into the funds of the Bankrupt's estate, with interest from July 29, 1912.

SIXTEENTH. Laura Eichel is entitled to recover nothing against this surety for her own benefit, and by the terms of the agreement between herself and said Bray, and by the adjudications heretofore made, the entire proceeds of claims purchased by Bray and standing in her name are to be paid to the said M. J. Bray, at cost, to reimburse him for moneys

expended by him for the purchase of the same; but your petitioner charges that the said Bray is not entitled to take that fund or any part thereof, until he shall first have accounted for his breaches of trust and the amounts of money for which he is accountable to the Bankrupt estate, and among the amounts that should be so retained from what the said Bray otherwise would be entitled to recover are the following:

1. An amount sufficient to cover the several sums collected on the claims on which judgments were rendered by the Court of Claims, with interest thereon from the time of receipt respectively aggregating $23,176.37, but subject to a credit of $6,500 being $16,676.37, with interest thereon from the 29th day of July, 1912.

2. That the said Bray agreed and bound himself to indemnify against their respective liability on the indemnity agreement and bond dated April 4th, 1904, two of said banks, to-wit: (a) First National Bank of Evansville, Ind., that bank being bound by the bank's indemnity bond aforesaid to indemnify your petitioner in the proportion that $24,000 bears to $115,000, or a percentage of 20.87. (b) The said Bray also bound himself to indemnify the City National Bank of Evansville, which is a party to the said bond agreeing to be assessed in the proportion of $5,000 to $115,000, or 4½% thereof.

The liabilities of these two banks on said bonds, together amount to about 25% of the total of whatever may be required to pay the excess over and above what is in the hands of this court or belonging to the bankrupt estate, applicable to material and labor claims, and your petitioner charges that both of said banks are located at Evansville in the State of Indiana, and the funds belonging or payable to Bray are in his hands as trustee of the bankrupt estate, and the whole fund located at Parkersburg within the jurisdiction of this Honorable Court and he should be required out of any funds payable to him herein on account of claims purchased, to pay such proportion of the excess after applying the funds in bankruptcy as are assessable against and

payable by the two banks so indemnified by him, according to the bond of April 4, 1904.

SEVENTEENTH. Your petitioner is advised and charges that the amount of $1,150 adjudicated to your petitioner, and the amounts heretofore adjudicated in favor of the claims of the Riter-Conley Co. and D. A. Rardin (no interest in these claims being in either the said Bray or Laura Eichel) should receive the amounts heretofore decreed to those claims, by the decree of the Referee of January 4, 1913; but all of the funds decreed in favor of the claims held by the said Bray or in the name of said Laura Eichel, as by the record shown, should be retained from distribution, and that the amounts chargeable to the said Bray should be deducted from the several sums decreed to be paid on these claims and the same should be turned over to the estate in bankruptcy to be paid out and distributed to those having a lien on such funds and entitled to distribution therein including the said judgment of the Nicolette Lumber Co. heretofore mentioned of $1,097.32, with interest thereon from the 12th day of November, 1912; and further that if any excess then remains of the funds adjudicated on the claims held by the said Bray there should be deducted out of that and paid over a sum sufficient to satisfy the amount apportionable on the indemnity bond and agreement of the said City National Bank and of the First National Bank whose liabilities in that regard have been assumed by the said M. J. Bray.

EIGHTEENTH. Your petitioner, upon information, charges that the said Jacob Eichel and the said M. J. Bray both reside in the City of Evansville, and State of Indiana; that neither of them have any estate or property in West Virginia, except certain claims against the estate of the bankrupt and therefore against the funds in the hands of this court in bankruptcy; that the said Bray and the said Jacob Eichel have been on terms of closest intimacy throughout the period herein referred to; that they had had many pecuniary transactions usually conducted in the name

of Laura Eichel and involving claims of funds belonging to the said estate; that in addition to the buying up of claims, the plant and chattels of the bankrupt estate were finally sold in 1905 and were purchased by a company organized under the name of the Ohio River Contract Co. of which Eichel, then lately a bankrupt, was manager and president and the funds were furnished by the said M. J. Bray or on his credit; that the sale of the claims above mentioned pending in the Court of Claims to the said Jacob Eichel is null and void, on account of the collusion and fraud existing between the said Bray and the said Eichel; that the petitioner does not know, and cannot state, as a matter of fact what was done by the said M. J. Bray with the funds derived from the judgments aforesaid or whether the said Bray pretended to go through the form of making an assignment of any such claim to the said Eichel, or whether in fact any part of that money was paid to the said Eichel, but your petitioner charges the fact to be that no part of the said pretended $6,500 was ever paid to the said M. J. Bray by Eichel, although in point of fact the said Bray agreed that the amount of $6,500 might be charged to him, and your orator charges that whether the money derived from these claims and judgments in the Court of Claims were in whole or in part paid over by the said Bray to the said Eichel, or whether the whole amount thereof was retained by the said Bray in person, he, the said Bray, is liable to account for the same and the said Eichel is also liable to account therefor as a participant in the fraud. Petitioner further avers that the said Eichel had agreed and covenanted to indemnify and save harmless against any liability to your petitioner on the indemnity bond dated April 4, 1904, the following banks who signed and sealed that bond and became bound thereby (See affidavit of Jacob in injunction suit, Rec. C. C. A., pp. 168-9), that is to say: The First National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, all of Indiana, which agreed to contribute respectively to the amount necessary to indemnify the surety in the propor-

tion that their respective debts of $5,000 and of $24,000.00 bore to the sum of $115,000, and your orator is entitled to have any moneys coming to the said Jacob Eichel out of these funds applied and paid on account of such indemnity, in order to save circuity of action.

Your petitioner shows that the said Jacob Eichel has bought and is the owner of the following claims which have been declared to be liens upon the funds of the estate in bankruptcy, the claim of Nicola Bros. Co. above mentioned, the par value of which is $1,197.60, and the Pittsburgh Trolley Pole Co. claim of par value of $634.40, and unless the funds belonging to said Eichel are now so applied by this court, the parties to be indemnified thereby would be without recourse against Eichel, and your petitioner charges that it is entitled to have all funds owned by either the said Bray or the said Eichel, or either of them applied to the settlement of any claims that your petitioner has against the respective Banks which they have respectively agreed to indemnify against the claims of your petitioner.

NINETEENTH. Several persons should be made parties to these proceedings by reason of their interest who have not proved claims against this estate.

As shown by the records (Printed Rec. No. 1246, p. 203)—under date of December 31, 1906, Laura Eichel and Jacob Eichel executed a note payable to the said M. J. Bray for the sum of $27,037.39 representing the net amount paid by Bray for the claims that had been purchased as having recourse on the bonds given by your petitioner as surety for the bankrupt. The said Laura Eichel is also a party to a contract between herself and the said Bray as shown by the record, p. 204, and she and Jacob Eichel are holders of several claims against the estate of the bankrupt, and they are interested and are proper parties to this proceeding.

The seven Banks bound as obligors under the contract of indemnity dated April 4, 1904, whereby they agreed to indemnify and save harmless your petitioner from all loss,

charge, damage and liability heretofore accruing or hereafter accruing by reason of your petitioner's suretyship on the four bonds mentioned, that is to say:

The City National Bank of Evansville, Indiana;
The First National Bank of Evansville, Indiana;
The Citizens National Bank of Evansville, Indiana;
The Second National Bank of Parkersburg, West Va.;
The Farmers & Mechanics Bank of Parkersburg, West Va.;
The Farmers Bank of Rockport, Indiana; and the
First National Bank of Rockport, Indiana,

all being corporations interested in the matters involved in this petition and in the application of the funds in the hands of the court and they are proper parties to this proceeding and are proper parties impleaded herein.

The claims appearing in the name of Nicola Bros. Co., $1,199.77, and of Pittsburgh Trolley Pole Co., $634.20, were acquired by the said Jacob Eichel and by him put in the name of his wife, Laura Eichel, without any consideration whatsoever, and the same are now owned by the said Jacob, although sued in the Pittsburgh cases in the name of his wife, and it was adjudged by the Circuit Court of Appeals for the Third Circuit (219 Fed. p. 810)—"the claims of the Pittsburgh Trolley Pole Co. and of Nicola Bros. Co. stand in substance on the same footing as the others and should be allowed against the Guaranty Co. only for the amount actually paid for them;" and the said Jacob Eichel has testified that these claims were bought by him at a discount of 15%, more or less, but your petitioner does not know what that discount was and charges, upon information, that Laura Eichel has no interest in any of the claims in which her name has been used as her name is a mere mask under which the said Bray and Jacob Eichel were speculating as fiduciaries in these accounts as decided by the District Court of the United States and by the Circuit Court of Appeals for the Fourth Circuit, and the said claims should be reduced to

actual cost, and the proceeds rising from any dividend on them should be applied on the liability of Jacob, to this fund.

Wherefore your petitioner prays:

1. That the said M. J. Bray, Trustee of the Evansville Contract Co., Bankrupt, and in his own right, and the said Jacob Eichel and Laura Eichel and the said Banks, that is to say:

The City National Bank of Evansville, Indiana;
The First National Bank of Evansville, Indiana;
The Citizens National Bank of Evansville, Indiana;
The Second National Bank of Parkersburg, West Va.;
The Farmers & Mechanics Bank of Parkersburg, West Va.;
The Farmers Bank of Rockport, Indiana; and the
First National Bank of Rockport, Indiana,

be made parties defendant to this petition and that due process may be issued against them and duly served or executed as to each of them.

2. That the said Bray, Trustee, in his own right, and the said Jacob Eichel be required to answer the interrogatories herein and addressed to them respectively.

3. That all of the defendants be required to answer this petition specifically as to each allegation thereof.

4. That the said Jacob Eichel and M. J. Bray, as Trustee and individually, be required by their answers to state specifically what amount and sums of money respectively they and each of them received from the several judgments rendered in the United States Court of Claims at Washington, D. C., hereinbefore set forth, when, if at all, any part of the moneys so received from judgments recovered in the Court of Claims were paid over to the said Jacob Eichel by said M. J. Bray, Trustee, and if so, at which time, in what amount, by what instruments or vouchers the same were so paid to the said Eichel, and what was done by Eichel with the funds, if any, so received, and they shall also state

whether or not an assignment was made by the said Bray, Trustee, of any of the several claims or judgments aforesaid, and whether or not such assignment or assignments were in writing, and if so, to state the date of same and produce a copy or copies thereof; and what was the actual net amount received by the said Bray, Trustee, from the Government on account of said claims and each of them respectively, and what receipt or receipts, if any, were taken by the said Bray from the said Eichel for any amount or amounts of money derived from said judgments or any of them, and paid by him to the said Eichel, and what profit, if any, or amount of such judgments was retained by Bray for his own use; —and that said M. J. Bray and the said Laura Eichel and said Jacob Eichel, and each of them, be required to answer and state:

(1). What was the amount of money paid by you or any of you for the certain claim hereinabove mentioned of $634.20 wherein the Pittsburgh Trolley Pole Company was the original creditor, and at what time was the same purchased?

(2). What was the amount paid by you or either one of you for the claim wherein the Nicola Bros. Co. was the original creditor amounting to about $1,199.77 and at what time was such payment made?

(3). In what claims, if any, which have been ordered to be paid by the decree of the Referee in Bankruptcy of January 4, 1903, did Jacob Eichel at any time have any interest, and if he has assigned any interest at any time heretofore held by him in such claims, state the date of the assignment, the name of the person and the consideration therefor.

(4). Did Jacob Eichel agree to indemnify any of the banks who executed the paper of 1904 unto the petitioner against any liability arising under that paper; if so, produce the agreement or agreements of counter indemnity so given by him or a copy or copies thereof?

The further prayer is that the court will ascertain the cost of the said claims of Nicola Bros. Co., $1,199.77, and of

Pittsburgh Trolley Pole Co., $634.20, and allow the same at the actual cost, and order and adjudge and decree the amounts recoverable thereon, are the property of the said Jacob Eichel, and that the pretended sale of all of the claims pending in the United States Court of Claims and mentioned and set out in the order of the Referee of April 30, 1908, and that the order itself be wholly set aside and annulled; that the said Jacob Eichel and the said M. J. Bray be required to answer and state specifically the amounts respectively received by them and by each of them from the several judgments rendered on the 23rd day of March, 1908, in favor of the said Bray, Trustee of the Bankrupt, and also what they and each of them received from the certain other judgments on claims pending in said court wherein the said Bray, Trustee, was plaintiff or claimant, to all of which reference has been made in this petition, and the further prayer is that the said Jacob Eichel and the said M. J. Bray and each of them be required to account and refund to the estate of the bankrupt the several sums of money so received on said claims, with interest from the date of the respective payments thereof, subject, however, to the credit of $6,500 charged to the said Bray as of the 29th day of July, 1912; and that a decree be made against them and each of them for the amounts received from such judgments less such credit with interest, that the amounts thus found, with interest thereon, shall be paid over to the estate of the bankrupt, and that the said M. J. Bray be charged in his accounts as Trustee for the same.

And the further prayer is that the amounts or amount found against the said M. J. Bray, in his own right or as Trustee, on account of moneys recovered or received in the said Court of Claims shall be deducted from whatever amount or amounts have heretofore been or may hereafter be decreed upon the several claims against the estate of the bankrupt allowed in the name of the said Laura Eichel and the proceeds of which have heretofore been decreed to be paid to the said M. J. Bray; that out of any moneys coming to the said M. J. Bray in this matter or proceeding, after mak-

ing good and accounting for the amounts collected by him on the judgments rendered in the Court of Claims above set forth; that if there should be any surplus or excess payable on claims heretofore allowed in favor of Laura Eichel or the said Bray, then there should be paid out of such surplus such amount as will be necessary to satisfy the proportion due from the banks which the said Bray has agreed to indemnify against their liability under the indemnity bond of April 4, 1904.

And the petitioner prays likewise that out of any fund, if any, in the hands of this court to which the said Jacob Eichel may be entitled, there shall be charged whatever may be found against him on account of moneys received from the several judgments rendered by the said Court of Claims, and if, after charging the same, there be any surplus to which the said Eichel will be entitled, then that he be charged with and there be deducted from the same such amount as may be necessary to satisfy the proportion assessable against any bank or banks which the said Eichel has agreed to indemnify.

Petitioner further prays that the court will direct the enforcement of the decrees heretofore entered in this cause by the Referee under date of January 4, 1913, for the distribution of the funds as decreed; the sum of $1,150 decreed in favor of your petitioner as part of the administration charges for premiums on bonds; unto the Riter-Conley Co. of Pittsburg, Pa., amounting to the sum of $4,946.24, and also unto Rardin & Co., the sum of $333.76, but that the payment be suspended and stayed as to all other claims directed to be paid, that is to say: All the claims held by the said M. J. Bray, and also the two claims of the Pittsburgh Trolley Pole Co., the principal of which is $634.20, and the claim of the Nicola Bros. Co., of which the principal is $1,199.77—until the court shall have disposed of and determined the proper distribution and payment of the same.

Petitioner prays that the judgment of $1,065.00 and $12.42 interest, and $19.90 costs, aggregating $1,097.32, in favor of the Nicolette Lumber Co. against your petitioner, paid November 30, 1912, by petitioner may be allowed as a

lien of equal priority with the other claims for labor and material under decree of January 4, 1913, and that the court will likewise allow the costs and expenditures and expenses and damages paid out and incurred by your petitioner in protecting its rights and in enforcing the indemnity to which your petitioner is entitled by the decree of the court and creditors of April 11, 1904, and by the indemnity and agreement of the banks aforesaid, which expenditures amount to $16,835.41, as shown by the schedule hereto annexed; and that the court will, having ascertained the total amount for which the Trustee is accountable, decree a distribution of the same to the satisfaction of all claims of labor and material having right of recourse upon your petitioner's bonds and to the payment of the said judgment in favor of the Nicolette Lumber Co., $1,097.32, and also costs and disbursements made by the petitioner as heretofore set forth amounting to $16,835.41; and that the court will marshal and distribute and administer the funds belonging to said estate in such manner as to fully protect the rights of all parties concerned, and to indemnify and protect this surety who has no interest whatever in the premises, except to be saved harmless as agreed by the court and the creditors, and this Trustee Bray and the said Jacob Eichel, all of whom were a party to these transactions; and that the court will render such further orders and decrees and grant such other relief in the premises as may be meet, proper and right, and as equity may require.

THE UNITED STATES FIDELITY AND GUARANTY CO.,

By B. M. AMBLER, *Counsel.*

B. M. AMBLER,
Attorney and Counsel.

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA, To-wit:

This day personally appeared before the undersigned, a Notary Public of said District residing in the City of Washington, duly commissioned and qualified, Charles F. Wood, who being by me first duly sworn, upon his oath says, that he is the person by this name referred to in the proceedings taken by the United States Fidelity & Guaranty Co. against M. J. Bray and others in the matter of the Evansville Contract Co., Bankrupt, in Bankruptcy, referred to in the above petition, that in the year 1904, and for several years thereafter he was the Chief Engineer of the Fidelity Company, and he was, among other matters, engaged in looking after the interests of that Company as surety on the Bonds of the Bankrupt as contractor; that after the year 1907, he left the employment of the Fidelity Company, until in 1914, he was requested to ascertain the facts and take special charge of its interests in the matters and accounts in the foregoing Petition set forth; that he has made investigation and diligently endeavored to fully inform himself; and the facts and allegations in the foregoing Petition, so far as stated on his knowledge, are true, and so far as stated on information, he believes the same to be true, and he is authorized to make this affidavit.

CHARLES F. WOOD.

Sworn and subscribed before me this 2nd day of May, 1915.

Witness my hand and official seal.

LLOYD A. DOUGLASS,
Notary Public, D. C.

My commission expires on the 30th day of April, 1919.

[SEAL] LLOYD A. DOUGLASS,
Notary Public, D. C.

A Copy Teste, T. A. BROWN, *Referee.*

UNITED STATES FIDELITY & GUARANTY COMPANY,
vs.
M. J. BRAY, ET AL.

Exhibit Statement of Claim for Indemnity Filed with Petition of June, 1915.

Estimated amount having recourse against the surety by the decree of January 4, 1913, about	$ 51,000.00
November 30, 1912, paid judgment of Nicolette Lumber Company	1,097.32
Paid for legal and other services	12,777.65
Clark's fees paid	866.13
Expenses of travel, telegrams and incidentals	857.88
Printing of records	1,930.90
Paid Bond Premiums on Appeals	422.00
Total amount necessary to indemnify, as of the date of the Petition	$ 68,951.88

BALTIMORE, May 25, 1915.

Claim B-233, The Evansville Contract Co., Madison J. Bray, Trustee.

TO UNITED STATES FIDELITY AND GUARANTY COMPANY, DR.—HOME OFFICE.

To Expenditures in connection with the contracts and claims growing out of the execution of the following bonds for the Evansville Contract Company:

BOND NO.	DATE	WORK	PENALTY
94682	11–15–00	Big Sandy	$ 30,000.00
229788	10–2–02	Congaree	30,000.00
236839	9–19–03	Congaree No. 3	50,000.00
230229	11–21–02	Dam No. 18	90,000.00
Total Bonds			$200,000.00

EXPENDITURES.

DATE	VOUCHER	NAME	AMOUNT
1904.			
May 5	No. 1	Van Winkle & Ambler.....	$ 152.80
1906.			
May 23	No. 2	Van Winkle & Ambler.....	529.25
1906.			
Nov. 22	No. 3	Graham & Cotton.....	11.89
1907.			
May 2	No. 4	Lyon, Hunter & Burke	79.00
June 8	No. 5	Charles Martindale.....	120.01
Oct. 1	No. 6	Van Winkle & Ambler.....	760.04
Oct. 12	No. 7	Charles Martindale.....	45.65
1907.			
Dec. 19	No. 8	Lyon, Hunter & Burke....	$ 17.57
1908.			
Jan. 25	No. 9	Lyon, Hunter & Burke	200.00
Feb. 24	No. 10	Citizens Trust & Guar. Co.	20.00
June 16	No. 11	Van Winkle & Ambler.....	327.94
June 13	No. 12	Lyon, Hunter & Burke	12.80
Feb. 25	No. 13	Citizens Trust & Guar. Co.	20.00
Aug. 30	No. 14	United Surety Co.....	25.00
Sept. 28	No. 15	Van Winkle & Ambler.....	1,000.00
Dec. 28	No. 16	Van Winkle & Ambler.....	129.89
1910.			
Jan. 7	No. 17	Lyon, Hunter & Burke	300.00
June 16	No. 18	Citizens Trust & Guar. Co.	20.00
Aug. 19	No. 19	United Surety Co.....	17.50
1911.			
June 24	No. 20	Citizens Trust & Guar. Co.	20.00
June 24	No. 21	Van Winkle & Ambler.....	490.00
Oct. 11	No. 22	United Surety Co.....	17.50
1912.			
May 29	No. 23	Citizens Trust & Guar. Co.	20.00
July 10	No. 24	Van Winkle & Ambler.....	567.65
Nov. 9	No. 25	Lyon, Hunter & Burke	20.00
Nov. 27	No. 26	Lyon, Hunter & Burke	1,097.32
Nov. 27	No. 27	Smith Bros.....	50.40

Date	Voucher	Name	Amount
1913.			
Feb. 5	No. 28	T. A. Brown	47.25
Apr. 8	No. 29	Lucy D. Davis	80.00
Apr. 26	No. 30	Lucy D. Davis	85.00
1914.			
Apr. 21	No. 31	Lyon, Hunter & Burke	$ 710.33
May 29	No. 32	Smith Bros. & Co	471.60
June 26	No. 33	Van Winkle & Ambler	195.12
July 7	No. 34	Schafer & Schoyer	40.00
Sept. 11	No. 35	Schafer & Schoyer	21.52
Sept. 25	No. 36	Smith Bros. & Co	111.60
Oct. 6	No. 37	Schafer & Schoyer	50.00
Dec. 9	No. 38	Schafer & Schoyer	500.00
1915			
Feb. 5	No. 39	Fidelity & Deposit Co	262.75
Mar. 12	No. 40	Smith Bros. & Co	16.00
Mar. 23	No. 41	Schafer & Schoyer	1,512.16
May 23	No. 42	Van Winkle & Ambler	3,350.00
May 23	No. 43	Chas. F. Wood	994.75
May 23	No. 44	Services and expenses of officers in connection with correspondence as per statement	606.44
May 25	No. 45	Charles F. Wood	2,806.00
Total			$ 17,932.73

United States of America,
Northern District of West Virginia.

I, T. A. Brown, Referee in Bankruptcy for the Northern District of West Virginia, do hereby certify that the foregoing are true and correct copies of "Statement of Claim for Indemnity," filed with petition of United States Fidelity & Guaranty Company, and "Statement of Expenditures in connection with the contracts and claims growing out of the execution of the following bonds for the Evansville Con-

tract Company," which original exhibits are now on file in my office, and were filed herein on the first day of July, 1915, said office being in the City of Parkersburg, State of West Virginia. I further certify that I am the proper custodian for said original papers, and that the said bankruptcy cause of Evansville Contract Company is now pending before me as Referee in Bankruptcy.

Given under my hand, this, the 11th day of October, 1916.

T. A. BROWN,
Referee in Bankruptcy.
Sten. One.

Rule Granted by Referee.

In the matter of

Evansville Contract Co., in Bankruptcy.

Bankrupt.

At Parkersburg, in said district, this the 29th day of June, 1915.

Upon the Petition of the United States Fidelity & Guaranty Company.

This day, the United States Fidelity & Guaranty Company filed its petition with the undersigned Referee in Bankruptcy, duly verified by affidavit, the matters arising thereon having been referred to said Referee by an order of the District Court made on June 10th, 1915. The said petition avers, among other things, that the decree made herein on the 4th day of January, 1913, by the Referee, has been affirmed by the Judge of the District Court and also by the United States Circuit Court of Appeals for the Fourth Circuit; and that in certain actions brought in the name of Laura Eichel against petitioner in the United States District Court for the Western District of Pennsylvania had been decided by the United States Circuit Court of Appeals for the Third Circuit, that the claims for material known as preferred and pretended to be owned by Laura Eichel should not be allowed at an amount in excess of actual cost, by reason of the fiduciary relations of the said M. J. Bray, Trustee, to the estate of the Bankrupt, and to the speculation in such claims; the petition alleges further:

1. That appeals have been taken from the decisions of the said Circuit Court of Appeals for the Third and Fourth Circuits to the Supreme Court of the United States; but that no supersedeas has been awarded to the decree of distribution made by the Court of Bankruptcy in this District; and that the mandate has been sent down, and that

there is no reason to suspend the distribution of the funds in the hands of the court except as to the matters especially alleged in the petition.

2. By the decree of January, 1913, a distribution of $34,378.02 out of a total of $38,055.40 then in the hands of the court, was ordered; that $1,150.00 was decreed to the petitioner for premiums, and that 66 2-3 per cent. of the amount of the claims for material should be paid after reducing the claims held by Laura Eichel, in which said Bray was interested, to actual cost, and to these material claims a preference was given over all the common creditors.

3. That among said material claims was one of Clydesdale Stone Company filed for $6,185.35 for which the said Bray and Eichel claimed to have paid $3,606.00, or 60 per cent. of the face value; but the Circuit Court of Appeals for the Third Circuit had decided that payments made to that Company should be applied on claims for which the Surety Company was liable, reducing the face of the liability of the Surety Company on account of the said Clydesdale Stone Company to $1,350.00, of which the cost would be 60 per cent. of $810.00, this being the only amount properly chargeable against petitioner by said Company; and the said Court of Appeals for the Third District did further decree that the claims of the Pittsburg Trolley Pole Company for the sum of $634.20 and of Nicola Bros. Company amounting to $1,199.77, should be reduced to exact cost when ascertained, and should be allowed at cost only.

4. That a judgment had been taken in the District Court for the Western District of Pennsylvania against the petitioner as security of the Bankrupt, on the 18th day of September, 1912, for the amount of $1,065.00, amounting with costs on the 30th day of November, 1912, to $1,097.32, which had been paid by the surety, and that it is entitled to be indemnified and saved harmless as to this judgment

which was not included in claims heretofore presented in Bankruptcy.

5. That it has been decided by the Referee, by the District Court, and by the Circuit Court of Appeals for the Fourth Circuit, that the petitioner is entitled to a lien on all the funds belonging to the Bankrupt estate for its protection, and that the claims in which the said N. J. Bray or Laura Eichel are interested, shall be allowed only at actual cost; that the total amount of claims having recourse on the petitioner's bonds amount to about $51,000.00, as heretofore decreed by this court, and includes also (A) the above mentioned judgment for $1,097.32; (B) all of the expenses and costs incurred in the litigation amounting to $4,057.76; (C) counsel fees and compensation of other employees, $12,777.65.

6. That the total liabilities and expenses and disbursements necessarily incurred and as to which the petitioner is entitled to be indemnified exceeds $68,000.00, while the fund in the hands of the court is less than $38,000.00, and that there will be a deficiency of more than $30,000.00, which latter is bearing 3 per cent. interest during delay caused entirely by the wrongs and frauds of the defendants, N. J. Bray, Trustee, and Jacob Eichel.

7. That the fiduciaries, N. J. Bray and Jacob Eichel, have appropriated, under the guise of a pretended sale more than $20,000.00 net cash realized by the said Bray, Trustee, upon claims of the Bankrupt against the Government of the United States, of which only $6,500.00 was accounted for; that a pretended sale of these claims by Bray to Eichel was authorized by the Referee under circumstances that amounted to a fraud, as indicated in an order dated April 30th, 1908, whereby Bray was authorized to sell such claims at the sum of $6,500.00 and assignment to be made upon the payment of that amount; but no such payment had been made when, on July 30th, 1912, the said Bray had recovered and had received from the Govern-

ment more than $20,000.00 net after payment of commissions—a fact unknown to the court or creditors and fraudulently concealed; and on July 30th, 1912, the court ordered that the sum of $6,500.00 be charged against Bray, Trustee, not knowing that this sum was a part of the fund belonging to the creditors already realized.

8. The petition charges the transactions as to the pretended sale of said claims is null and void; that the amount net, after deducting commissions, and derived from the recoveries made by Bray, Trustee, of the Bankrupt, against the Government were, on July 29th, 1912, with interest, $23,176.37, against which there has been charged as of that date $6,500.00, leaving an amount exclusive of interest from July 29th, 1912, of $16,676.37, all of which should be paid into the estate of the Bankrupt as having been fraudulently retained out of funds belonging to that estate.

9. The petitioner charges that certain banks herein named by their bond of indemnity dated April 4th, 1904, agreed to indemnify the Surety Company against all loss, charge, damage and liability in the premises; that the share for the First National Bank of Evansville, Indiana, was by the terms of the bond, 20.87 per cent., and of the City National Bank of Evansville, Indiana, 4½ per cent. of the amount necessary to give such indemnity, and that the said Bray had agreed and bound himself to indemnify those banks respectively against their liability on the said indemnity agreement held by the petitioner.

10. That the said Jacob Eichel had agreed to indemnify the First National Bank of Evansville, and the Citizens National Bank of Evansville, respectively, as a counter-indemnity on the said bond on which each of them was liable in the proportion of $24,000.00 to $115,000.00, or 20.87 per cent., and the petitioner charges that the said surety is entitled to have any moneys coming either to Bray or to Eichel out of the claims aforesaid, or out of any other

funds of the estate applied for the relief and indemnity of the surety; and that the said Jacob Eichel is the owner of the claim of Nicola Bros. Co. and of the Pittsburg Trolley Pole Co. which were transferred by him to his wife, Laura, without consideration.

11. Petitioner prays:

1. That the said M. J. Bray, Trustee, and in his own right, and Jacob Eichel and Laura Eichel, and the City National Bank of Evansville; the First National Bank of Evansville; the Citizens National Bank of Evansville; the Farmers Bank of Rockport, Indiana; the First National Bank of Rockport, Indiana; all being corporations located in Indiana, and the Second National Bank of Parkersburg, West Virginia, and the Firmers & Mechanics Bank of Parkersburg, West Virginia be made parties defendant and a process issued against them and duly served or executed as to each.

2. That the said Bray Trustee, in his own right, and the said Jacob Eichel be required to answer the interrogatories herein and addressed to them respectively.

3. That all of the defendants be required to answer this petition specifically as to each allegation thereof.

4. That the said Jacob Eichel and M. J. Bray, as Trustee and individually, be required by their answers to state specifically what amounts and sums of money respectively they and each of them received from the several judgments rendered in the United States Court of Claims at Washington, D. C., hereinbefore set forth; when if at all, any part of the moneys so received from judgments recovered in the Court of Claims were paid over to the said Jacob Eichel by said M. J. Bray, Trustee, and if so, at what time, in what amount, by what instruments or vouchers the same were so paid to the sad Eichel, and what was done by Eichel with the funds, if any, so received, and they shall also state whether or not an assignment was made by the said Bray, Trustee, of any of the several claims or judg-

ments aforesaid, and whether or not such assignment or assignments were in writing, and if so, to state the date of the same and produce a copy or copies thereof; and what was the actual net amount received by said Bray, Trustee, from the Government, on account of said claims, and each of them respectively, and what receipt or receipts, if any, were taken by the said Bray from the said Eichel for any amount or amounts of money derived from said judgments or any of them, and paid by him to the said Eichel, and what profit, if any, or amount of such judgments was retained by Bray for his own use;—and that said M. J. Bray and the said Laura Eichel and said Jacob Eichel, and each of them, be required to answer and state:

(1.) What was the amount of money paid by you or any of you for the certain claim hereinabove mentioned of $634.20 wherein the Pittsburg Trolley Pole Company was the original creditor, and at what time was the same purchased?

(2.) What was the amount paid by you, or either one of you, for the claim wherein the Nicola Brothers Company was the original creditor, amounting to about $1,199.77, and at what time was such payment made?

(3.) In what claims, if any, which have been ordered to be paid by the decree of the Referee in Bankruptcy of January 4, 1903, did Jacob Eichel at any time have any interest, and if he has assigned any interest at any time heretofore held by him in any such claims, state the date of the assignment, the name of the person and the consideration therefor.

(4.) Did Jacob Eichel agree to indemnify any of the banks who executed the paper of 1904 unto the petitioner against any liability arising under that paper? If so, produce the agreement or agreements of counter indemnity so given by him or a copy or copies thereof.

The further prayer is that the court will ascertain the cost of the said claims of Nicola Brothers Company, $1,199.77 and of Pittsburg Trolley Pole Company, $634.20 and

allow the same at the actual cost, and order, adjudge and decree the amounts recoverable thereon, are the property of said Jacob Eichel, and that the pretended sale of all of the claims pending in the United States Court of Claims and mentioned and set out in the order of the Referee of April 30th, 1908, and that the order itself be wholly set aside and annulled; that the said Jacob Eichel and the said M. J. Bray be required to answer and state specifically the amounts respectively received by them, and by each of them, from the several judgments rendered on the 23d day of March, 1908, in favor of the said Bray, Trustee of the Bankrupt, and also what they and each of them received from the certain other judgments on claims pending in said court wherein the said Bray, Trustee, was plaintiff, or claimed, to all of which reference has been made in the petition; and the further prayer is that the said Jacob Eichel and the said M. J. Bray, and each of them, be required to account and refund to the estate of the bankrupt the several sums of money so received on said claims, with interest from the date of the respective payments thereof; subject, however, to the credit of $6,500.00 charged to the said Bray as of the 29th day of July, 1912; and that a decree be made against them and each of them for the amounts received from such judgments, less said credit with interest; that the amount thus found, with interest thereon, shall be paid over to the estate of the bankrupt, and that the said M. J. Bray be charged in his accounts as Trustee for the same.

And the further prayer is that the amount or amounts found against the said M. J. Bray, in his own right or as Trustee, on account of moneys recovered or received in the said Court of Claims, shall be deducted from whatever amount or amounts have heretofore been or may hereafter be decreed upon the several claims against the estate of the Bankrupt allowed in the name of the said Laura Eichel and the proceeds of which have heretofore been decreed to be paid to the said M. J. Bray; and that out of any moneys coming to the said M. J. Bray in this matter or proceeding,

after making good and accounting for the amounts collected by him on the judgments rendered in the Court of Claims above set forth; that if there should be any surplus or excess payable on claims heretofore allowed in favor of Laura Eichel or the said Bray, then there should be paid out of such surplus such amount as will be necessary to satisfy the proportion due from the banks which the said Bray has agreed to indemnify against their liability under the indemnity bond of April 4th, 1904.

And petitioner prays likewise that out of the fund, if any, in the hands of this court to which the said Jacob Eichel may be entitled, there shall be charged whatever may be found against him on account of moneys received from the several judgments rendered by the said Court of Claims, and if, after charging the same, there be any surplus to which the said Eichel will be entitled, then that he be charged with and there be deducted from the same such amount as may be necessary to satisfy the proportion assessable against any bank or banks which the said Eichel has agreed to indemnify.

Petitioner further prays that the court will direct the enforcement of the decrees heretofore entered in this cause by the Referee under date of January 4th, 1913, for the distribution of the funds as decreed; the sum of $1,150.00 decreed in favor of your petitioner as part of the administration charges for premiums on bonds; unto the Riter-Conley Company of Pittsburg, Pennsylvania, amounting to the sum of $4,946.24, and also unto Rardin & Company the sum of $3,333.76, but that the payment be suspended and stayed as to all other claims directed to be paid, that is to say: All the claims held by the said M. J. Bray, and also the two claims of the Pittsburg Trolley Pole Company, the principal of which is $634.20, and the claim of the Nicola Brothers Company of which the princpal is $1,199.77—until the court shall have disposed of and determined the proper distribution and payment of the same.

Petitioner prays that the judgment of $1,065.00 and

$12.42 interest, and $19.90 costs, aggregating $1.097.32, in favor of the Nicolette Lumber Company against your petitioner, paid November 30th, 1912, by petitioner may be allowed as a lien of equal priority with the other claims for labor and material under decree of January 4th, 1913, and that the court will likewise allow the costs and expenditures and expenses and damages paid out and incurred by your petitioner in protecting its rights and in enforcing the indemnity to which your petitioner is entitled by the decree of the court and creditors of April 11th, 1904, and by the indemnity and agreement of the banks aforesaid, which expenditures amount to $16,835.41, as shown by the schedule hereto annexed; and that the court will, having ascertained the total amount for which the Trustee is accountable, decree a distribution of the same to the satisfaction of all claims of labor and material having right of recourse upon your petitioner's bonds and to the payment of the said judgment in favor of the Nicolette Lumber Company, $1,097.32; and also costs and disbursements made by petitioner as heretofore set forth amounting to $16,835.41; and that the court will marshal and distribute and administer the funds belonging to said estate in such manner as to fully protect the rights of all parties concerned, and to indemnify and protect this surety who has no interest whatever in the premises, except to be saved harmless as agreed by the court and the creditors and this Trustee Bray and the said Eichel, all of whom were a party to these transactions; and that the court will render such further orders and decrees and grant such other relief in the premises as may be meet, proper and right, and as equity may require.

Upon consideration whereof, it is ordered that 10 o'clock A. M., on the 26th day of July, 1915, be and is hereby fixed and designated for the hearing of the matters arising upon the said petition at the office of the undersigned Referee in the Logan Building, at the Corner of Third and Juliana Streets, in the City of Parkersburg, and State of West Virginia; that a copy of this order be served

and executed upon each of the defendants named in the prayer of said petition; that such service be made by the United States Marshals of the respective Districts in which the defendants respectively reside in Indiana and in West Virginia, and that the defendants and each of them are notified to appear and defend and protect their interests respectively and to plead or answer to said petition, or to file motions to dismiss the same; and to show cause why the relief prayed for in said petition should not be granted, and why a decree should not be entered in favor of the Bankrupt estate for the difference between the net amount collected by the Trustee from the Government in the Court of Claims, and the sum of $6,500.00 charged against him on July 29th, 1912.

Service of copies of this order shall be deemed good and sufficient service of process on said petition.

T. A. BROWN,
Referee in Bankruptcy.

A copy of the petition of the U. S. Fidelity & Guaranty Co. is attached hereto as "Ex. A."

T. A. BROWN,
Referee.

Motion of Bray to Dismiss.

FILED OCTOBER 1, 1915

This defendant, in his individual capacity and as Trustee in Bankruptcy of the Evansville Contract Company, moves to dismiss said petition for the reasons alleged in the motion to dismiss of Jacob Eichel, this day filed herein, to which said motion this defendant refers and now makes the same a part hereof.

And for said reasons and other reasons appearing upon the face of said petition and the proceedings to which it refers, the said M. J. Bray, individually and as Trustee, as aforesaid, moves that said petition be dismissed.

(Signed) M. J. BRAY,
By Counsel.

(Signed) H. P. CAMDEN,
Solicitor.

Motion of Eichel to Dismiss.

FILED OCTOBER 1, 1915

This defendant moves to dismiss said petition for the following reasons:

FIRST: Because the said petitioner does not show on the face of its present petition, or on the face of the amended petition filed on or about the 12th day of July, 1912, to which reference is made, that the said petitioner stands in the relation of creditor to the bankrupt, with proof of claim allowed by the Referee in Bankruptcy.

SECOND: Because the said petitioner does not show on the face of either of the petitions last above mentioned that it has a lien or claims to have a lien on any of the property of the bankrupt, except "such plant as it" (the bankrupt) "may own or have upon said work;" and it appears from the face of said petition that the money derived from the sale of claims against the government was not

money derived from any such plant, and the said petitioner, therefore, has no lien upon or interest in it.

THIRD: Because it appears on the face of said petition that the creditors of the bankrupt who had filed proofs of claim that had been allowed, and who alone were authorized to consent to a sale of the claims against the government, did authorize a sale of said claims, and they, by acquiescing therein, still ratify and confirm said sale.

FOURTH: Because it appears on the face of said petition that if said petitioner is a creditor of the bankrupt, it is a secured creditor, and a secured creditor has no right to vote upon the question of a sale of claims against the government upon which it has no lien, or upon any other question, without first surrendering its security, unless the amounts of such secured claims exceed the value of such securities or priorities, and then only for the excess, and it does not appear, from the allegations of said petition or otherwise, that there was any excess of said claims over said securities.

FIFTH: Because it appears from the proceedings heretofore had in this cause that a special committee was appointed by the Referee in Bankruptcy to examine into and report upon the value of the said claims against the government, and that said committee made its examination and report prior to the time that said claims were purchased by Jacob Eichel, and the same was a part of the record of these proceedings at the time of said purchase, and said report made full disclosure of everything affecting the value of said claims; and further because it appears from the face of said petition that on the 5th day of April, 1908, twenty-five days before said claims were purchased, M. J. Bray, Trustee in Bankruptcy, informed the Referee that judgments had been rendered to the amount of $9,000.00, in round numbers, on said claim, in favor of said bankrupt estate.

SIXTH: As to the right of Laura Eichel to recover anything on account of the claims against the bankrupt, as-

signed to and owned by her, as heretofore shown in these proceedings, said petition should be dismissed, because the rights of Laura Eichel in this respect have heretofore been adjudicated and no appeal or petition for review was taken or filed by said petitioner, and the rights of Laura Eichel in this respect are now *res adjudicata*, all of which appears from the face of said petition and the proceedings to which it refers.

SEVENTH: In so far as said petition seeks a readjudication of the claim of the Clydesdale Stone Company, it should be dismissed, because said claim was, by a proper order entered in said bankruptcy proceedings, allowed, and no appeal therefrom or review thereof was sought or taken by said petitioner within the time prescribed by the act of bankruptcy; and the same is true of the claim of the Pittsburg Trolley Pole Company and of the claim of Nicola Brothers Company. Said claims stand adjudicated, and the fact appears on the face of said petition and the proceedings to which it refers, and said petition should be dismissed as to these matters.

EIGHTH: Said petition should be dismissed as to the claim of Nicolette Lumber Company, amounting to $1,065.00, for which it is alleged in said petition judgment was recovered against said petitioner in the District Court for the Western District of Pennsylvania, amounting, with costs, on the 30th day of November, 1912, to $1,097.32, because it appears on the face of said petition that proof of said claim was not filed in these bankruptcy proceedings within the time prescribed by law, and it is now too late to file proof of such claim, and such claim cannot be set up and proved by a petitioner in the manner in which it is sought to be done by said petitioner.

NINTH: Said petition should be dismissed as to the right of recovery from the seven banks that entered into an indemnifying bond with said petitioner, as alleged therein, because said bond was entered into by said banks with said petitioner in the country, and the same is no part of an of-

ficial act of this court and said petition is multifarious in this respect, in this: That it seeks to recover in a bankruptcy proceeding upon a bond executed by seven banks with which the bankruptcy court had nothing whatever to do and in which the creditors of the bankrupt are in no way interested.

TENTH: Said petition should be dismissed in so far as it seeks to recover damages from M. J. Bray, Trustee, and in his individual right, and Jacob Eichel and Laura Eichel, in these bankruptcy proceedings, sufficient to cover the expenses of litigation and costs necessarily incurred and expended "in the several proceedings mentioned," as shown on the face of said petition. Said petition is multifarious for this reason.

For the foregoing and other reasons appearing upon the face of said petition and the proceedings to which it refers, the said Jacob Eichel moves that said petition be dismissed.

JACOB EICHEL,
By Counsel.

H. P. CAMDEN,
Solicitor.

Answer of Bray.

FILED OCTOBER 1, 1915

This respondent, for answer to said petition, or to so much thereof as he is advised that it is necessary for him to answer, says that the matters and things alleged in the first ten paragraphs of said petition are true, except that it is not true, as alleged in the fifth paragraph of said petition, that the fund in the hands of the court is loaned out at only three per cent. interest, and except also that it is not true, as alleged in the tenth paragraph, that the fund stands on a deposit in banks which pay only three per cent., while many of the debts are running at six per cent., which makes a loss of three per cent. for ten years, and it is not true that such loss of interest or any loss of interest has been caused by the delays and wrongful action of this respondent and Jacob Eichel.

This respondent says that the fund in the registry of this court and now on deposit in various banks is drawing four per cent. interest, and that the delay in closing up this estate is due to the litigation instituted by the said petitioner and which is now awaiting final determination in the Supreme Court of the United States.

This respondent says that the matters and things alleged in the eleventh paragraph of said petition are substantially true, except that it is not true that the claim of the Nicolette Lumber Company has not been set up or proven in these bankruptcy proceedings, and this respondent says in this respect that a claim was proven by said Nicolette Lumber Company in said bankruptcy proceedings, by the affidavit of John W. Leach, filed therein within the proper time by Van Winkle & Ambler, counsel for said Nicolette Lumber Company, and this respondent is informed and believes that said claim is the same claim on which judgment was recovered against said petitioner, as alleged in the eleventh paragraph of said petition.

This respondent denies that the said petitioner has any

valid claims justly recoverable from the estate of the bankrupt and from the trustee, and denies that said petitioner has a lien on assets of the said bankrupt, but this respondent is not advised of what claim said petitioner may have against the seven respectiv banks that executed the bond of indemnity dated the 4th day of April, 1904, and respondent is advised that whatever claim said petitioner may have against said banks is a matter separate and distinct from these proceedings in bankruptcy, and that the right of said petitioner to recover against said seven banks by reason of said indemnity bond cannot be litigated in these proceedings.

This respondent is advised and so alleges that the expenses of litigation and of costs necessarily incurred and expended in the several proceedings mentioned by said petitioner cannot be recovered in these proceedings in bankruptcy, no matter what they may amount to, but this respondent, on information and belief, denies that the costs and expenses paid and incurred by said petitioner amount to as much as sixteen thousand dollars, in round numbers, or any sum near to sixteen thousand dollars.

This respondent says that it is not true, as alleged in the various petitions filed by said petitioner herein, that said petitioner did not know that Jacob Eichel was obtaining control of the so-called preferred claims until long after all of the litigation mentioned by said petitioner had been pending, and until after the proceedings mentioned had reached the Circuit Court of Appeals in the Third and Fourth Circuits, and had been argued therein, as alleged in said petition. This petitioner says in this respect that said petitioner entered into a deliberate arrangement with said Jacob Eichel, by which said Jacob Eichel was to obtain control of said so-called preferred claims and said petitioner was to waive its alleged lien upon the plants of the bankrupt, all of which will more fully appear by the pleadings heretofore filed in said proceedings; and this respondent says that said petitioner knew that pursuant to this arrangement said

Jacob Eichel was obtaining control of said so-called preferred claims.

This respondent says that it is true that Jacob Eichel was employed by the trustees in bankruptcy of said bankrupt, at a salary of five hundred dollars a month and his necessary expenses, as alleged in the fourteenth paragraph of said petition, but this respondent denies that the said Jacob Eichel was in the employ of said trustees in bankruptcy pursuant to said employment, after the 12th day of February, 1905, and respondent says that the records of said proceedings plainly show that said Jacob Eichel was not in the employ of said trustees in bankruptcy or of said bankrupt's estate, in any manner whatsoever, after the 12th day of February, 1905, and that the said petitioner has either purposely concealed the record in this respect, or with gross negligence amounting to fraudulent concealment, has failed to observe the record in this respect.

This respondent says that the said Jacob Eichel was not in the employ of this trustee in bankruptcy or of the estate of said bankrupt, in any manner whatsoever, in the year 1906, or in the year 1907, or in the year 1908 or in any subsequent year, and that it is not true that the said Jacob Eichel sustained any relation of employment or of confidence or trust to said bankrupt's estate on the 30th day of April, 1908, when he purchased the claims against the United States Government and the Monongahela River Consolidated Coal & Coke Company, mentioned in the 14th paragraph of said petition, and this respondent says in this respect that said claims were purchased by said Jacob Eichel at a creditor's meeting duly called by the referee in bankruptcy for said purpose, among others, which said meeting B. M. Ambler, counsel for said petitioner, urged the said referee in bankruptcy to call for the purpose of having decisive action taken on the proposition of Jacob Eichel to buy said claims, and respondent says that decisive action was taken at said creditor's meeting, and that the proposition of said Jacob Eichel to purchase said claims was

unanimously accepted by the creditors present, and that the referee in bankruptcy, with full knowledge that a judgment had been rendered in favor of said bankrupt's estate for the sum of $9,725.00, entered an order confirming said sale, because it appeared to be to the best interest of the estate to dispose of said claims on the terms named in said written proposition and said petitioner refused to appear at said meeting because it was not interested in said proposition but intended to rely upon its right of action against said seven banks.

This respondent says that said meeting of the creditors for the purpose of considering said proposition was not called at the instance and request of this respondent, but that it was called by the referee in bankruptcy after he had sent out letters to counsel representing all of the creditors of said bankrupt, laying the situation before them and requesting each of them to advise him of the probability of favorable action being taken on said proposition before he should go to the expense of calling said meeting, and that said meeting was called as a result of the response received from said counsel advocating the call of said meeting, and B. M. Ambler, counsel for said petitioner, was one of the counsel who advocated the calling of said meeting in order that decisive action might be taken by said creditors.

This respondent says that he did not know of the calling of said meeting until he received notice of the call thereof from the referee in bankruptcy, and that twelve days before said meeting was called he advised the said referee in bankruptcy that a judgment had been rendered in favor of said bankrupt's estate, on several of said claims, for the sum of $9,730.00, subject to appeal by the government, and this respondent further stated that he hardly thought it worth going to the expense of calling a meeting of the creditors until the referee was ready to make a decision as to the money then on hand, all of which will more fully appear by the original of said letter, in the file of these proceedings, and a copy of which is filed with the answer of

Jacob Eichel herein, marked "Exhibit Eichel No. 4," to which reference is here made.

This respondent says that it was known to the referee in bankruptcy at the time of said creditors' meeting on the 30th day of April, 1908, and was known to the creditors present and represented at said meeting, that said judgment had been rendered, and this respondent says that said referee in bankruptcy and the creditors of said bankrupt had been kept fully advised of the status of the litigation pending in the Court of Claims at Washington on said claims, and of the prospects of recovery thereon, as fully and completely as any one could be advised of such matters, and respondent emphatically denies that it was stated to the referee, T. A. Brown, by this respondent and by Jacob Eichel, prior to the 29th and 30th days of April and on those days, that the claims were very doubtful and could not be established without great difficulty, as alleged in the fourteenth paragraph of said petition, and respondent calls attention to the known falsity of this statement and contradiction thereof in the same sentence of said petition in which said charge is made, where it is stated, in effect, that this respondent and Jacob Eichel stated to the referee, Honorable T. A. Brown, prior to the 29th and 30th days of April, and on those days, that the claims were very doubtful and could not be established without great difficulty, except that Bray, about April 5, 1908, informed the referee that judgments had recently been rendered for about nine thousand dollars.

This respondent says that he had no understanding whatsoever with Jacob Eichel in regard to the purchase of said claims; that when he learned said meeting was called for the purpose of considering the proposition of Jacob Eichel to purchase said claims, this respondent wrote to Jacob Eichel, who was then at Ashland, Kentucky, advising him that he had received notice of the call of said meeting and stating to said Eichel that the creditors must have urged the referee to call that meeting, as this respondent gave him full information of the status of the Washington claim and

discouraged the call for a meeting, and this respondent says that the facts stated in said letter are true and that this respondent did discourage the call for a meeting and not only that but this respondent, in the letter addressed to Referee Brown advising him of the status of the Washington claims, stated that he thought that Jacob Eichel ought to increase his bid in view of the fact that said judgment had been rendered.

Respondent says that said petitioner may not have been present or represented at said meeting of the creditors, but respondent says that according to his best recollection B. M. Ambler was present at said meeting, but requested that no note be taken of his appearance, and this respondent says that at a great many meetings of said creditors the said B. M. Ambler, who was then counsel for said petitioner, appeared, but stated that he did not represent any one and that he did not want his appearance noted.

Respondent says that the purchase of said claims was not the purchase alone of the three claims on which judgment had been rendered, but that it was a purchase of all the claims being prosecuted in the name of the trustee in bankruptcy against the government and against said Monongahela River Consolidated Coal & Coke Company; that said claims were being prosecuted at the expense of said estate, except the attorney's fee alone, and that said estate had already expended about $..... in the prosecution thereof, and there was no assurance that any more judgments would be recovered on any of said claims; that there was a contract outstanding with Dudley & Michener, by which said claims were to be prosecuted by them for a contingent of twenty per cent. of a part of said claims and twenty-five per cent. of a part of said claims, and that twenty-five per cent. of one of the largest of said claims was owned by J. G. Thomas; that the prosecution of said claims could not be dropped without the consent of said attorneys, and no man could say how much it would cost to prosecute said claims to final judgment; that it was thought that the

said administration of said bankrupt's estate was about to be closed up and that it would be advisable to get rid of the risk of said litigation, as well as the cost of continuing the machinery of bankruptcy in order to prosecute said litigation, and this respondent says that so far as he knows the creditors of said bankrupt came to an honest conclusion that it would be better for them to sell said claims and let Jacob Eichel get behind the cost and expense of prosecuting the same, so that said estate could be speedily wound up, rather than to assume the risk of all these costs and expenses themselves, and respondent says that said creditors sold said claims with their eyes open and with knowledge that Jacob Eichel might either make or lose money in the further prosecution of said claims.

This respondent says that after the 30th day of April, 1908, when said claims were purchased by said Jacob Eichel, they were treated by this respondent and by the referee in bankruptcy and by Dudley & Michener, counsel for the trustee in bankruptcy, as the claims of Jacob Eichel, and the technical question of whether an assignment in writing had been made to Jacob Eichel or not was not considered by any one until the said petitioner raised said question as an evidence of fraud.

This respondent says that by the terms of said offer of Jacob Eichel the claims were to be paid for in cash on the day that a decree of distribution of the funds to the credit of said proceeding was made and entered by the referee, and that it was then contemplated that said estate would be speedily wound up and that a decree of distribution would soon be rendered and that no one had any idea that the litigation instigated by said petitioner would prolong the closing of said estate for eight or ten years more.

This respondent says that said offer was accepted on the terms set forth in the written proposition of said Jacob Eichel, the same to be accepted and delivered to the said Eichel by the said trustee upon the payment of the sum of $6,500.00 by said Jacob Eichel to the said M. J. Bray,

Trustee. Just exactly what this meant this respondent does not know, but this respondent construed it to mean that said Jacob Eichel was to become the owner of said claims, and on the 4th day of May, 1908, this respondent addressed a letter to said referee in bankruptcy, in which he specifically states that he had notified Dudley & Michener, attorneys at Washington, that at a creditors' meeting of the Evansville Contract Company, all claims against the Government, including those against which judgment had been rendered, had been sold and assigned to Jacob Eichel, and this respondent asks the said trustee, "If this is not exactly correct, let me know as soon as possible," all of which will more fully appear by said original letter dated May 4, 1908, addressed to Honorable T. A. Brown, Referee, Parkersburg, W. Va., signed by M. J. Bray, Trustee, now in the file of said proceedings, which is prayed to be taken and read as a part hereof.

Respondent says that said construction of said deal was acquiesced in by said referee in bankruptcy and that it was understood by this respondent that said claims had been sold to said Jacob Eichel as of the 30th day of April, 1908, and that they were not to be paid for until a decree of distribution was entered in said bankruptcy proceedings, as provided by the terms of said offer, but that thereafter, in the year 1912, when this respondent filed a report of the financial condition of said estate and showed that he held the obligation of Jacob Eichel for the sum of $6,500.00, some criticism was made thereof by counsel for said petitioner, and thereupon this respondent, thinking that he had made a mistake, filed a supplemental report calling attention to his understanding of the terms of said sale, but correcting the same so as to make his account conform to the construction put upon the terms of said sale by counsel for said petitioner, and charging himself with the sum of $6,500.00, as money paid by Jacob Eichel for said claims, all of which will more fully appear by the two reports of this respondent, filed in said proceedings on the .... day of ....., 1912, to which reference is here made.

This respondent says that if any mistake was made by this respondent, and if any adjustment of interest should now be made because of said mistake, this respondent is perfectly willing to have the same adjusted.

This respondent says that he knows of the recovery of no other judgments on said claims than those set forth in the petition of said petitioner.

This respondent says that the attorney's fee for recovering the judgment rendered on the 23rd day of September 1910, for $1,639.57, was twenty-five per cent., instead of twenty per cent., as alleged on page twenty-one of said petition.

This respondent says that he does not know when said petitioner first learned of the recovery of the judgment of March 23, 1908, but respondent says that said petitioner could have known of the recovery of said judgment on the 30th day of April, 1908, if it had seen fit to be present or represented at the meeting of the creditors on that day, which it, through its counsel, declined to have anything to do with.

This respondent denies that he has in any manner, purposely or otherwise, concealed from the creditors of said bankrupt or from the referee in bankruptcy or from anyone else, recovery of any judgment in favor of said bankrupt's estate of any other fact affecting the value of said claims, and he denies that he has colluded with Jacob Eichel in any manner in his efforts to purchase said claims, and he denies that he has violated any trust or fiduciary relation imposed upon him by virtue of his office as trustee in bankruptcy, or otherwise, and this respondent says that the allegations of said petition in this respect are artificially colored by ignoring those parts of the record which would give true color to the facts, and that they are absolutely false so far as they charge this respondent with fraud and collusion or violation of his duties as trustee.

Answering the interrogatories put to this respondent by said petition, this respondent says:

1. That he did not pay any amount of money for the claim mentioned of $634.20, wherein the Pittsburgh Trolley Pole Company was the original creditor; that he did not purchase said claim and has no interest therein.

2. That he did not pay anything for the claim wherein the Nicola Brothers Company was the original creditor amounting to about $1,199.77; that he did not purchase said claim and has no interest therein.

3. This respondent is informed and believes that Jacob Eichel has no interest and never had any interest in the claims directed to be paid by the decree of the referee in bankruptcy of January 4, 1913.

4. This respondent is informed and believes that Jacob Eichel agreed to indemnify certain of the banks of Indiana who executed the paper of 1904 unto the petitioner, but this respondent says that the paper is not in his possession or control and he is not able to produce it.

This respondent denies each and every allegation in said petition contained, not hereinbefore specifically admitted. And now having fully answered, this respondent prays to be hence dismissed, with his reasonable costs by him in this behalf expended. And he will ever pray, etc.

M. J. BRAY,
By Counsel.

H. P. CAMDEN,
Solicitor.

Answer of Eichel.

FILED OCTOBER 1, 1915

This respondent, for answer to said petition or to so much thereof as he is advised that it is necessary for him to answer, says that it is true that the several proceedings alleged in the first ten paragraphs of said petition have taken place in the bankruptcy proceedings of the Evansville Contract Company; in the District Court for the Western District of Pennsylvania and in the Circuit Court of Appeals for the Third Circuit sitting at Philadelphia; in the District Court for the Northern District of West Virginia, and in the Circuit Court of Appeals for the Fourth Circuit sitting at Richmond; and that the decisions in said several proceedings are now pending in the Supreme Court of the United States, on appeal taken by this respondent and others.

This respondent says that it is true that on the 18th day of September, 1912, an action was brought in the District Court for the Western District of Pennsylvania, against the United States Fidelity & Guaranty Company, by the Nicolette Lumber Company, and that judgment was rendered in said action, in favor of said plaintiff, on the 30th day of November, 1912, for $1,097.32, as alleged in said petition, but it is not true that said claim has not been presented as a claim against the estate of the bankrupt, the Evansville Contract Company; respondent says that said Nicolette Lumber Company appeared in said bankruptcy proceedings, and through Van Winkle & Ambler, as counsel, filed proof of a claim against said bankrupt, which this respondent believes is the same claim on which said suit was brought, but respondent is not prepared to say whether said claim was allowed or not.

This respondent denies that the said petitioner, the United States Fidelity & Guaranty Company, has a lien of any kind upon any of the assets of the bankrupt, and he alleges in this respect that this is one of the matters in issue in the cases now pending in the United States Supreme

Court, and this respondent says that this court should not undertake to again determine the question of lien or no lien until the United States Supreme Court has fully and finally determined that question for this court.

This respondent says that the said petitioner never claimed a lien upon the claims of the said bankrupt against the United States Government until its present petition was filed herein, although this is the third petition filed by said petitioner in these proceedings. This respondent denies that said petitioner has a lien of any kind, or even the shadow of a lien of any kind upon the claims of said bankrupt against the United States Government or against any fund derived therefrom.

This respondent says that he does not know what the expenses of the litigation in which said petitioner has indulged in these proceedings amount to, neither does he know the amount of the costs necessarily incurred and expended in the several proceedings mentioned; but this respondent does know and now alleges that said litigation was voluntarily instigated and commenced by said petitioner, and, as this respondent believes and so alleges, without any just cause in law therefor, but this respondent says that whether the latter is true or not, he is advised and so alleges that said petitioner cannot recover in these proceedings, by way of damages or otherwise, the expenses of litigation and of costs necessarily incurred and expended in these proceedings.

This respondent, answering that particular part of said petition which charges that M. J. Bray and this respondent, by fraud and collusion and in violation of their express trust, have conspired to take and have taken and appropriated a sum running into thousands of dollars, says that it is not true that either this respondent or the said M. J. Bray, or that both of them acting in collusion, have taken and appropriated any sum of money whatsoever belonging to said bankrupt's estate, in violation of any trust relation imposed upon them or either of them by their official connection with

said bankrupt's estate, or otherwise, and this respondent denies that he has taken and appropriated any sum of money whatsoever belonging to said bankrupt's estate.

This respondent says that it is true that the said bankrupt, the Evansville Contract Company, was, at the date of bankruptcy, the owner of several claims against the United States Government, arising out of the several contracts which the said Evansville Contract Company had with the United States Government; that an itemized list of said claims is correctly set forth in said petition, on pages 15 and 16 thereof, and your petitioner calls attention to the fact, as there stated, that a part of said claims was subject to the payment of twenty-five per cent. of the recovery thereon, for attorneys' fees, and that the residue of said claims was subject to the payment of twenty per cent. of the recovery thereon, for attorneys' fees, and that Claim No. 24,887, Big Sandy River, was subject to joint ownership by J. C. Thomas, who owned twenty-five per cent. of the face of said claim.

This respondent admits that on the 11th day of April, 1904, an order was entered by the referee in bankruptcy, authorizing the trustees of said bankrupt's estate to employ this respondent to assist said trustees in conducting the business of the bankrupt, which had been directed in order to enable said trustees to complete several contracts with the United States Government, which it was believed could be completed at a profit to the said bankrupt's estate, and also "to prepare, present and try, for, to and in the Court of Claims of the United States the several claims of the said Evansville Contract Company against the United States," and respondent says that he was to be paid for his said services $500.00 per month, and in addition thereto his necessary expenses in the discharge of his duties, all of which is correctly shown on page 13 of said petition.

Your respondent says that he is not a licensed attorney and that his said employment did not contemplate that he should appear as attorney in said cases in the Court of

Claims, but simply that he should assist Dudley & Michener, who had been retained as counsel for said bankrupt's estate, in maturing said causes for hearing before the Court of Claims at Washington, and your respondent says in this respect that prior to bankruptcy he had been the general manager of said Evansville Contract Company and was more familiar with the merits of said claims than any one else, and was the only one who possessed knowledge of who the material witnesses were and what they would testify to in support of said claims, and he was also the only one outside of the trustees in bankruptcy who seemed to take any particular interest in prosecuting said claims against the United States Government. Respondent says that the creditors of said bankrupt were legion, and no one creditor had enough at stake to justify him in looking after said claims, and the trustees in bankruptcy, as well as said attorneys, were obliged to and did rely upon this respondent in great measure to furnish the names of the witnesses and all other information necessary for maturing and prosecuting said claims. This respondent further says in this respect that it was difficult to get the referee in bankruptcy to direct the expenditure of sufficient funds for the prosecution of said claims and that on more than one occasion this respondent voluntarily and out of his own pocket advanced the money necessary to pay the costs and expenses of said litigation, as will more fully appear hereinafter.

This respondent says that after his said employment he entered upon the discharge of his said duties and faithfully and earnestly discharged the same to the best of his ability until the 12th day of February, 1905, at which time he was relieved of his duties as assistant to said trustees and as assistant to said attorneys, and that thereafter this respondent had no connection whatsoever with the prosecution of said claims, as agent or employee of said bankrupt's estate or as assistant to said trustees in bankruptcy or as assistant to said attorneys, or otherwise. But this respondent says that after his connection with said bankrupt's estate ceased, he voluntarily gave certain assistance and

information to said attorneys in the further prosecution of said claims until about December, 1905, at which time several of said claims pending in the Court of Claims at Washington were believed to be matured for hearing, so far as said bankrupt's estate was concerned, although it turned out afterwards and subsquently to the time that this respondent became the purchaser of said claims, that a great deal more work had to be done in connection therewith, as will hereinafter more fully appear.

Respondent says that no concealment or misrepresentation whatever was made in regard to the prosecution of said claims or the status thereof or the prospect for recovery thereon; but on the contrary, this respondent says that from time to time full reports were made by the trustees in bankruptcy and others, to the referee in bankruptcy. Respondent says in this respect that on the 23d day of February, 1905, C. D. Dotson and Alfred Heine, two of the then trustees in bankruptcy, in the absence of Mr. Bray, who is now charged with colluding with this respondent, filed their written report on the status of said claims, in which they say: "As regards the Washington claims, these trustees can make no report except to say that they have a recent letter from their Washington attorneys, in which they state that they can form no estimate either as to the amount we can hope to recover or as to the time when we can hope to recover," all of which will appear by the report of said two trustees, filed in said proceedings on the day and date last aforesaid, to which reference is here made.

This respondent says that there was no certainty about the right to recover on any of said claims; that said claims were first presented to the engineer for the Government in charge of the works at the several places from which said claims emanated, and they were turned down by said engineer; that they were then presented, upon an appeal from the engineer in charge of the works, to the chief engineer of the United States Government, and that they were turned down by him; and that they were then next presented to the

Controller of the Treasury of the United States Government, and that they were passed on adversely by him; and then finally they reached the Court of Claims in Washington, after three adverse decisions against said bankrupt, in which court said claims were pending in the year 1905 and thereafter.

This respondent says that on or about the ..... day of September, 1906, the estate of said bankrupt had been fully administered and was in condition to be closed up, with the exception of said claims against the Government and certain other choses in action, and Madison J. Bray, who had then become sole trustee in bankruptcy, concluded, in view of the expense of continuing said bankruptcy proceedings for an indefinite period for the purpose of prosecuting said claims, that it would be wiser to sell the same and wind up said estate, and with that view said Madison J. Bray, sole trustee as aforesaid, on the 9th day of September, 1906, filed his petition before George W. Johnson, then referee in bankruptcy, praying for authority to sell the same, so that said estate could be wound up and said expenses abated, all of which will more fully appear by the original petition filed in said bankruptcy proceedings on the day and date last aforesaid, now comprising a part of the records of said proceedings.

This respondent says that on the 11th day of September, 1906, an order or decree was entered in said bankruptcy proceedings, pursuant to the prayer of said M. J. Bray, Trustee as aforesaid, authorizing him to sell said claims and choses in action, at public auction, and pursuant to said authority the said M. J. Bray, Trustee as aforesaid, advertised said sale to take place on the 29th day of September, 1906, at the front door of the United States Postoffice building, in the City of Parkersburg, and on the day and at the time and place specified in said advertisement, said claims and choses in action were offered for sale at public auction, to the highest bidder, the same being first offered separately and then as a whole, and the same were knocked down to this

respondent for the sum of $3,000.00 in cash, with the understanding that the purchase was without recourse upon said estate and without liability for costs already incurred or which might thereafter be incurred in the prosecution of said claims, and subject to all rights which attorneys or any other persons might have in the amount of the recovery of said claims, all of which will more fully appear by the report of sale made by said M. J. Bray, Trustee, to Honorable George W. Johnson, then referee, in said proceedings, on the 29th day of September, 1906, now comprising a part of the records of these proceedings, to which reference is here made.

This respondent says that thereupon the Oil Well Supply Company and the Pittsburgh Supply Company, creditors of said bankrupt, filed their petition in said proceedings, protesting against the confirmation of said sale, to which the said M. J. Bray, Trustee, filed his answer, in which he fully set forth the history of said claims, the then status thereof and the manner in which the same had been sold to this respondent for said sum of $3,000.00, all of which will more fully appear by the protesting petition of said last named creditors, filed in these proceedings on the 17th day of October, 1906, and the answer of M. J. Bray, Trustee, to said petition, filed in these proceedings on the 19th day of October, 1906, to both of which reference is here made.

This respondent says that as a result of said protest, a committee was appointed by the referee in bankruptcy, composed of C. D. Merrick, attorney for several of said creditors, and J. A. Dupuy, then counsel for the trustee in bankruptcy, to inquire into and report upon the status of said claims before the Court of Claims and the prospects for recovery thereon, all of which will more fully appear by the order of the referee in bankruptcy, entered in said proceedings on the ..... day of November, 1906, to which reference is here made.

This respondent says that thereupon said committee went to Washington, D. C., and inquired into the condition of said claims as they then stood before the Court of Claims,

and they made and filed in said proceedings their written report thereon, in which they report that a considerable portion of said claims appeared to be meritorious and seemed to deserve a favorable consideration and determination by the Court of Claims, and otherwise state the condition of said claims, and they recommended that said sale of said claims for the sum of $3,000.00 to the respondent be set aside, which said report was filed in said bankrupt proceedings on the 15th day of November, 1906, to which reference is here made.

This respondent says that after said last named report was made and filed, an order was entered by the referee in bankruptcy, refusing to confirm the sale of said claims to this respondent for the sum of $3,000.00 and setting aside and annulling the same.

This respondent says that said M. J. Bray, Trustee, in January, 1907, again thought it advisable to close up said estate, and on the 11th day of January, 1907, said M. J. Bray, Trustee, filed his petition in said proceedings, asking that a creditors meeting be called to determine whether said claims should be again exposed to sale, the object being to wind up said estate as speedily as possible, and said trustee asked the court to determine in proper manner whether said claims should be again exposed to sale or whether sale should be withheld until the Court of Claims had decided the cases then pending before it, and the said trustee then states that copies of the printed record in all of said cases were in the hands of his attorney and that any creditor or attorney of any creditor might inspect the same and inform himself of the status of said claims, the amount thereof and the possibility of recovery thereon, and he invited the creditors of said bankrupt to fully investigate the same, so that they could form their own judgment as to the value of said claims and vote intelligently thereon, all of which will more fully appear by said petition of said trustee, filed in said proceedings on the 11th day of January, 1907, to which reference is here made.

Respondent says that no action was taken on said petition by the Referee in Bankruptcy prior to the 28th day of January, 1908, at which time the District Court for the Northern District of West Virginia rendered an opinion on a certain petition filed by the United States Fidelity & Guaranty Company bearing upon said bankruptcy proceedings, by which said opinion the matters and things alleged therein were referred to the referee in bankruptcy, and thereupon, on the 28th day of January, 1908, M. J. Bray, Trustee in Bankruptcy, addressed a letter to the referee, in which he made the following request: "Can you not soon make a decision as to the rightful owners of the money in your court and order me to pay the same out accordingly?" all of which will more fully appear by the original of said letter in the file of said proceedings, a copy of which is filed as a part of this answer, marked "Exhibit Eichel No. 1," and the same is prayed to be taken and read as a part hereof.

This respondent further says that some time prior to April 1, 1908, this respondent made known to the referee in bankruptcy that he was willing to pay five thousand dollars for said claims, and thereupon the referee in bankruptcy, on April 1, 1908, addressed a letter to B. M. Ambler, counsel for said United States Fidelity & Guaranty Company, and all other counsel of record for the creditors of said bankrupt, in which he advised them that this respondent desired to submit a proposition to pay five thousand dollars for said claims against the Government and the claim against the Monongahela River Consolidated Coal & Coke Company, and stated that he addressed the letter to them for the purpose of obtaining their opinion as to whether it would be worth while to call a meeting of the creditors to consider the proposition, all of which will more fully appear by the record copy of said letter, dated April 1, 1908, addressed to Mr. Smith D. Turner, Parkersburg, W. Va., by the referee in bankruptcy, now in the file of these proceedings, a copy of which, with note appended thereto showing to whom said letter was addressed, duly certified by M. C. Greer, Stenog-

rapher, in the office of said referee at this time, is filed herewith, marked "Exhibit Eichel No. 2" and prayed to be taken and read as a part of this answer.

Respondent says that on April 3, 1908, B. M. Ambler, attorney for said United States Fidelity & Guaranty Company, made reply to said letter of said referee, in which he states that he represents no interest whatever in the estate of the Evansville Contract Company, except the United States Fidelity & Guaranty Company, and that his client was only a surety and held a contract or bond of indemnity executed by certain banks of Indiana and Parkersburg and would rely upon recourse against those banks for any liability that might be imposed and that under the circumstances his client was not in a position, nor was he authorized as its counsel to make any agreement that could affect or release funds or claims to which indemnitors had a right to resort, and for that reason he begged to be excused from expressing an opinion as to the probability that the offer made by this respondent would be accepted. He then further states, "My clients will neither accept nor decline, for the reason that it concerns the indemnitor banks rather than the Fidelity Company; but you will permit me to say that before your appointment some of the creditors thought that matters were being somewhat juggled in the handling of these claims, and it would be well now to hold a meeting of the creditors to have decisive action taken upon that subject, all of which will more fully appear by the original of said letter in the file of these proceedings and by a copy thereof duly certified by said M. C. Greer, Stenographer as aforesaid, filed herewith, marked "Exhibit Eichel No. 3" and prayed to be taken and read as a part hereof.

This respondent says that he is informed and believes and so alleges that thereafter on April 5, 1908, while M. J. Bray, Trustee as aforesaid, was at Pittsburgh, Pennsylvania, he was advised that a judgment had been rendered in three cases, amounting to $9,730.00, which is the same judgment amounting to $9,725.00, to which petitioner re-

fers on page 21 of its said petition; and thereupon the said M. J. Bray, Trustee, on April 5, 1908, addressed a letter to Honorable T. A. Brown, Referee, in which he states that he had learned, through Dudley & Michener, Attorneys, that judgments had been rendered in favor of the bankrupt in three cases, amounting to $9,730.00, subject to appeal by the Government, and that after all fees and expenses were paid, there ought to be something over $5,000.00 left, and said trustee then states that "in view of the above judgments I think that Mr. Eichel might raise his bid. I hardly think it worth going to the expense of calling a meeting of the creditors until you are ready to make a decision as to the money now on hand, which I sincerely hope will have a tendency to draw the warring factions together and enable us to close up this long drawn out piece of business," all of which will more fully appear by the original of said letter in the file of these proceedings, a copy of which, duly certified by said M. C. Greer, Stenographer as aforesaid, is filed herewith as a part of this answer, marked "Exhibit Eichel No. 4" and the same is prayed to be taken and read as a part hereof.

This respondent says that thereafter, to wit, on the 18th day of April, 1908, this respondent reduced to writing his offer to pay $5,000.00 cash for the claims against the Government and the amount due the estate from the Monongahela River Consolidated Coal & Coke Company, and had the same signed in this respondent's name, by C. D. Dotson, and filed before said referee in bankruptcy, all of which will more fully appear by said offer in writing, filed in said proceedings on the 18th day of April, 1908, now comprising a part of the record thereof, to which reference is here made, and respondent says that on the same day and date said referee in bankruptcy called a meeting of the creditors of said Evansville Contract Company for the 29th day of April, 1908, to consider said last named offer of this respondent and to transact such other business as might properly come before said meeting, all of which will more fully appear by the original notice calling for said meeting, filed in said

proceedings and made a part thereof, a copy of which is filed herewith marked "Exhibit Eichel No. 5" and the same is prayed to be taken and read as a part of this answer.

Respondent says that he was then at Ashland, Kentucky, and that on the 23rd day of April, 1908, after said creditors meeting had been called, he received the following letter from M. J. Bray:

"MR. JACOB EICHEL,

"Ashland, Ky., care Ashland Fire Brick Co.,

"DEAR SIR:—I wrote you on the 21st, but directed the letter to Ashland, Ohio; have just written the postmaster to forward the same to you, but for fear that you will not get it in time I will repeat it.

"Just received notice from Referee Brown for a meeting called at Parkersburg, April 29th, at 2:00 P. M., for the following purposes: to consider offer of J. Eichel to pay $5,000.00 cash for claims due estate from U. S. Government pending in Court of Claims, and amount due said estate from Monongahela River C. C. & C. Co., involved in suit pending in U. S. Circuit Court in Pittsburgh, Pa.

"Did you request Brown to call this meeting; will you be there? Do you think that I had better attend that meeting?

"I received yours containing check for $22,067.00, and made report to Buckhan of how I used the money, and ordered him to report to you. Also received yours of the 18th stating that you would be in Evansville May 1st and 2nd.

"The creditors must have urged Brown to call that meeting, as I gave him full information of the status of the Washington claim, and discouraged the call for a meeting.

"If you want me to meet you anywhere on your way down, let me know so that we can go on to Parkersburg together, if you think best."

This respondent says that the said M. J. Bray, Trustee as aforesaid, had informed the Honorable. T. A. Brown, Referee in Bankruptcy, of the rendering of said judgment in favor of said bankrupt's estate, and had discouraged the calling of said meeting, by stating, as hereinbefore shown, that he hardly thought it worth going to the expense of calling a meeting of the creditors until he was ready to make a decision as to the money then on hand, and respondent denies that there was any collusion or connivance or prearrangement of any kind whatsoever between this respondent and the said M. J. Bray, Trustee, in making said offer of $5,000.00 for said claims or in having said meeting called for the purpose of considering the offer of $5,000.00 theretofore made by this respondent for said claims, or for the purpose of having said offer or any other offer made by this respondent accepted by said creditors. On the contrary thereof, this respondent says that B. M. Ambler, counsel for said United States Fidelity & Guaranty Company, recommended in his said letter that "it would be well to hold a meeting of the creditors to have decisive action taken upon that subject," as hereinbefore shown.

This respondent says that on the 29th day of April, 1908, the day set for a meeting of the creditors, said meeting was adjourned until the 30th day of April, 1908, and that on the 30th day of April, 1908, this respondent entered into negotiations with the creditors of said bankrupt at said creditors meeting, for the purchase of said claims against the Government and said claim against the Monongahela River Consolidated Coal & Coke Company, and this respondent further says that he was informed and believed at that time, and he is informed and believes now, and so alleges, that it was known to said creditors and to the referee in bankruptcy that a judgment had been rendered on several of said claims, in favor of said bankrupt's estate, for the said sum of $9,700.00, in round numbers, and respondent further says that he is informed and believes that said United States Fidelity & Guaranty Company, as a creditor of said bankrupt, had notice of said meeting.

Respondent says that at that time it was claimed by this respondent that $700.00, in round numbers, was due him on account of certain expenses incurred and money advanced by this respondent in the litigation with the Monongahela River Consolidated Coal and Coke Company, and this respondent says that he offered to cancel said indebtedness and to pay for said claims the sum of $6,500.00, which said offer was reduced to writing after negotiations were had with the creditors of said bankrupt at said meeting, and it was ascertained that such an offer would be accepted by them, and the offer made by this respondent, as aforesaid, is correctly set forth on pages 14 and 15 of the petition of said petitioner.

This respondent says that said offer was unanimously accepted by the creditors and decisive action was taken, as advised by B. M. Ambler, and the said petitioner, through its said counsel, refused to have anything to do with said meeting or with said offer, and respondent is advised and now alleges that said petitioner is now precluded from complaining of what was done at said creditors meeting by the creditors of said bankrupt

This respondent denies that he controlled more than a majority of the claims voting for the resolution accepting said proposition, and respondent denies that at the creditors meeting held on the 30th day of April, 1908, for the purpose of considering the offer of this respondent, he controlled any of the said claims except those owned by him individually and those owned by his wife, Laura Eichel, and this respondent denies that any of said claims were voted at all upon said proposition.

This respondent does not know whether said petitioner was present or represented at said meeting or not, and respondent alleges in this respect that the said B. M. Ambler had a way of appearing at meetings of the creditors of said bankrupt and then requesting that his appearance be not entered, so that his said client could get the benefit of having counsel present to direct what should be done, and then

not be prejudiced by anything that was done if it might thereafter turn out to be to the prejudice of his said client. This respondent says that to the best of his recollection the said B. M. Ambler was present in this manner at the meeting of creditors held on the 30th day of April, 1908, at which the offer of this respondent to purchase said claims was accepted.

This respondent says that it is absolutely false that it was stated to the referee, Honorable T. A. Brown, by the said M. J. Bray and by this respondent, prior to the 29th and 30th days of April, and on these days, that the claims were very doubtful and could not be established without great difficulty, and respondent calls attention to the absurd conflict in statements made by said petitioner in this respect, on page 16 and 17 of said petition, where it is alleged that such statements were made to the Honorable T. A. Brown by said M. J. Bray and this respondent, prior to the 29th and 30th days of April, and on those days, and then adds, "Except that Bray, about April 5, 1908, informed the referee that judgments had been recently rendered, as more fully shown below, for about $9,000.00, subject to commissions which would make a net recovery of about $7,000.00."

This respondent s[illegible] that the referee in bankruptcy was of the opinion that it would be to the best interest of said estate to dispose of said claims on the terms named in said written proposition, as shown by the order entered thereon on the 30th day of April, 1908, quoted in said petition, and respondent says that it is to be considered in this respect that said litigation was expensive to said estate in more respects than one. The traveling expenses of counsel and of witnesses and the per diem of witnesses had to be paid, and respondent is informed and believes and so states that upwards of two thousand dollars had already been expended by said estate in prosecuting said claims; that the recovery on said judgment for $9,700.00 was subject to twenty per cent. discount for attorneys' fees, so that the net

recovery thereon was $7,740.00 in round numbers; that said judgment was subject to appeal by the Government, and the right of appeal still existed; that said purchase was not the purchase of this one claim but of all claims against the Government, and that all claims against the Government were subject to a contract with Dudley & Michener, by which said estate was compelled to prosecute said claims to final judgment at the expense of said estate, attorneys' fees alone excepted, and that the prosecution of said claims could not be dropped without the consent of said attorneys and without paying them just compensation for the services already rendered by them in prosecuting said claims; that this respondent offered for said claims $7,200.00, in round numbers, with the understanding that this respondent then got behind said claims and became personally responsible for the prosecution thereof and the expenses of all litigation incurred in the prosecution thereof, and this respondent now says that in the further prosecution of said claims he spent more than two years of his own time without further compensation than the additional recoveries obtained by him on said claims, and that he also expended in the further prosecution of said claims the sum of three or four thousand dollars, which he risked and which said estate was unwilling to risk in the further prosecution thereof, and this respondent says that he had no greater assurance than any one else had that further judgments would be rendered in favor of said bankrupt's estate, as the result of further prosecution of said claims.

This respondent again denies that at the time of the purchase of said claims he sustained any relation of trust or confidence whatsoever towards the estate of said bankrupt, or towards any of the parties interested therein or connected therewith, and respondent says in this respect that the records of the bankruptcy proceedings plainly show that this respondent was not in the employ of said trustees in bankruptcy in any manner or for any purpose, after February 12, 1905, all of which will more fully appear by the petition of this respondent filed in these proceedings on the 11th day of

February, ..., in which this respondent plainly states that he has not charged any salary and does not ask any since the 12th day of February, 1905, and also by the petition of this respondent filed in said proceedings on the 11th day of December, 1905, in which this respondent claims salary down to February 11, 1905, and this respondent says that all of said proceedings were as open to investigation of counsel for petitioner as any of the other proceedings which counsel has seen fit to emphasize in this case, while concealing these proceedings.

This respondent says that the purchase of said claims was a speculation pure and simple; that time and money still had to be expended in prosecuting said claims and that there was no assurance that there would be any recovery on any more of them; that it was a speculation in which money might be lost or won, and this respondent was willing to take the risk of losing money therein, and the creditors of said estate were not willing to take said risk; and this respondent now says that while judgments were thereafter rendered in favor of said bankrupt's estate, on some of said claims, yet judgment was rendered against said bankrupt's estate on several of said claims, and that before judgment was finally rendered on all of said claims this respondent spent several thousand dollars out of his own pocket in procuring witnesses and in paying their traveling expenses and the traveling expenses of counsel, as well as his own expenses and in otherwise maturing said claims for hearing; and also spent a great deal of valuable time, for all of which this respondent would not have been reimbursed if he had charged at the rate of $500.00 per month for his said services and the money so expended.

This respondent denies that it was the duty of this respondent to inform said petitioner of the rendering of said judgment; that counsel for said petitioner was informed of the probability of calling said creditors meeting, and said counsel advised the calling of said creditors meeting and then refused to enter an appearance at said meeting for said

petitioner, though this respondent is informed and believes that counsel for said petitioner was actually present at said meeting.

This respondent says that by the terms of said offer the claims were to be paid for in cash on the day that a decree of distribution of the funds to the credit of this proceeding was made and entered by the referee, as will more fully appear by said offer as contained on page 15 of said petition.

This respondent says that said offer was accepted "on the terms set forth in the written proposition of said Jacob Eichel, the same to be executed and delivered to the said Eichel by the said trustee, upon the payment of the sum of $6,500.00 by the said Jacob Eichel to the said M. J. Bray, Trustee." Respondent says that capital is sought to be made by said petitioner out of the fact that no assignment was executed and delivered to this respondent by said Bray, Trustee, and that said judgments were delivered to this respondent before a decree of distribution was made and entered in said proceedings. Respondent says that there was no concealment of any of the facts in this respect from the referee in bankruptcy by said M. J. Bray, Trustee; that on the 10th day of July, 1908, said M. J. Bray, Trustee, as aforesaid, addressed a letter to Honorable T. A. Brown, Referee in Bankruptcy, in which he states, "The certificates of the Government in payment of the judgments in favor of the Evansville Contract Company have been made out to Bray, Dotson and Heine by the carelessness or forgetfulness of the Washington attorneys," all of which will more fully appear by the original of said letter in the file of said proceedings, a copy of which by M. C. Greer, Stenographer as aforesaid, is now filed herewith marked "Exhibit Eichel No. 6," and the same is prayed to be taken and read as a part hereof.

This respondent says that it was known to said referee that warrants were being issued in payment of the judgments in favor of the Evansville Contract Company, on the 10th day of July, 1908, and it was also known that said war-

rants were being turned over to this respondent by the said trustee, pursuant to the terms of said contract of purchase; that on the 4th day of May, 1908, said M. J. Bray, Trustee, in a letter addressed to said referee on the day and date last aforesaid, specifically states that he has notified Dudley & Michener, Attorneys, at Washington, that at a creditors meeting of the Evansville Contract Company, all claims against the Government, including those against which judgment has been rendered, had been sold and assigned to Jacob Eichel, adding "If this is not exactly correct let me know as soon as possible," all of which will more fully appear by said original letter dated May 4, 1908, addressed to Honorable T. A. Brown, Referee, Parkersburg, W. Va., signed by M. J. Bray, Trustee, now in the file of said proceedings, a copy of which, certified by M. C. Greer, Stenographer as aforesaid, is filed herewith, marked "Exhibit Eichel No. 7," and the same is prayed to be taken and read as a part hereof.

Respondent says that he is informed and believes that said statement was acquiesced in by said referee in bankruptcy, and that it was understood by said M. J. Bray, Trustee, and by this respondent, that said claims had been sold to this respondent as of the 30th day of April, 1908, and that they were not to be paid for until a decree of distribution was entered in said bankruptcy proceedings, as provided by the terms of said offer, but that thereafter, in the year 1912, when the said M. J. Bray filed a report of the financial condition of said estate and showed that he held the obligation of this respondent for said sum of $6,500.00, some criticism was made thereof by counsel for said petitioner, and thereupon said Bray, Trustee, thinking that he had made a mistake, filed a supplemental report calling attention to his understanding of the terms of said sale, but correcting the same so as to make his account conform to his then understanding of the terms of said sale, and charging himself with said sum of $6,500.00 as money paid by this respondent for said claims, all of which will more fully appear by the two reports of said Bray, Trustee, filed in

said proceedings on the.....day of.....
....., 1912, to which reference is here made.

This respondent says that the judgments rendered in favor of the bankrupt's estate on said claims are correctly shown on page 20 of said petition, and that the respective dates of paying the same are correctly shown on page 21 of said petition, and this respondent says that these are all the judgments rendered in favor of said bankrupt's estate on said claims, and that on all the rest of said claims judgments have been rendered adverse to the contention of said bankrupt.

This respondent says that the attorneys' fee charged for recovering the judgment rendered on the 23rd day of September, 1910, for $1,639.57, was twenty-five per cent., instead of twenty per cent., as alleged on page 21 of said petition.

This respondent says that the record of these proceedings shows, and counsel for said petitioner could easily have ascertained, that the proceedings in said Court of Claims were originally in the name of Madison J. Bray, Alfred Heine and C. D. Dotson, Trustees in Bankruptcy, but that after the death of Alfred Heine and the resignation of C. D. Dotson, said suits were revived in the name of Madison J. Bray alone, and were prosecuted in his name alone.

This respondent says that he is advised that if there is liability on the part of any one or more of the indemnitor banks on their said bond of indemnity to said petitioner, that is a matter entirely between said banks and said petitioner, arising out of a contract that was entered into in the country and which is in no way a part of these proceedings in bankruptcy, and that said petitioner cannot litigate its right against said banks on said indemnifying bond in these proceedings.

This respondent says that he is not the owner of the claim of Nicola Brothers Company or of the claim of the Pittsburgh Trolley Pole Company, but that said claims are owned by his wife, Laura Eichel, and respondent further

says that said claims, along with other claims against said bankrupt's estate, were purchased with the knowledge and consent of said petitioner, and that said petitioner now has no right to complain of the manner in which they were purchased or of the sum paid for the purchase thereof, and this respondent says that the case in which it was adjudged by the Circuit Court of Appeals for the Third Circuit that said claims should be allowed against the Guaranty Company only for the amount actually paid for them is now pending on appeal in the Supreme Court of the United States, on appeal from said decision in this respect, among other things therein contained.

Respondent, answering the interrogatories contained in said petiton, says:

1. That he did not pay anything for the claim of the Pittsburgh Trolley Pole Company, amounting to $634.20, and that the same was not purchased by him.

2. That he did not pay anything for the claim of Nicola Brothers Company, amounting to $1,199.77, and that he did not purchase same.

3. That this respondent never has had any interest in the claims ordered to be paid by the decree of the referee in bankruptcy of January 4, 1913, which this respondent assumes is the decree referred to in said petition as the decree of January 4, 1903.

4. This respondent agreed to indemnify some of the Indiana banks against liability arising under the bond of indemnity "of 1904 unto the petitioner," but this respondent is advised that his liability, if any, is to said banks and not to said petitioner, and that this respondent cannot be made liable in any manner whatsoever until said banks are first made liable and are obliged to pay, and upon advice of counsel respondent declines to produce the "paper" until directed so to do by the order of this court.

As to the claim of the Clydesdale Stone Company for $6,185.35, this respondent says that the amount thereof and

the liability of said petitioner therefor was adjudicated by this court on the ..... day of November, 1904, and again on the 4th day of January, 1913, and the decree adjudicating the same was not appealed from by said petitioner and was not sought to be reviewed by said petitioner, and it is now too late to open up said claim and readjudicate the amount thereof in any respect; and this respondent now pleads and relies upon said decree as *res adjudicata*.

This respondent denies each and every allegation in said petition contained, not hereinbefore admitted. And now having fully answered, this respondent prays to be hence dismissed with his reasonable cost in this behalf expended. And he will ever pray, etc.

JACOB EICHEL,
By Counsel.

H. P. CAMDEN,
Solicitor.

TRANSCRIPT OF TRIAL.

And now, Monday, October 16, 1916, this cause came on to be heard before Hon. Charles P. Orr, Judge, at ten o'clock A. M.

APPEARANCES.

FOR PLAINTIFF: Wm. E. Schoyer, Esq.
FOR DEFENDANTS: Wm. M. Hall, Esq.

Mr. Hall:

Last Monday after coming down here and explaining to your Honor the situation about getting proof of the situation in West Virginia, I wrote to Mr. Camden, and he is now here. I also sent to the Referee, Mr. Brown, copies of the petition and answer, and Mr. Brown's rule or process, as it is called, and Mr. Brown certified the petition and the answers, and I have them there. He failed to certify the rule, which covers about twenty-five pages of typewritten matter. I wired about it. His letter, accompanying the certified copies, sets out that he will send copies of all orders entered since the filing of the petition so as to reach me prior to the 16th. That has not come. Mr. Camden on last Friday tried to get it from the Referee, and it ought to be here. The record of that case is not complete without it. I do not see any reason why I could not offer and file it when it gets here.

The Court:

There is no objection to that, is there?

Mr. Schoyer:

No objection outside of my whole objection to its materiality. If it would be proper now, it would be proper later on.

Mr. Hall:

I offer a paper styled a petition or statement and claim for indemnity, filed with the petition of the United States Fidelity & Guaranty Company, in the office of the Referee, T. A. Brown, of the Northern District of West Virginia, certified under the Bankruptcy Law of 1898, showing a proceeding on the part of the United States Fidelity & Guaranty Company before the District Court of the Northern District of West Virginia, to suspent the payment and distribution of the fund of the Evansville Contract Company in bankruptcy in that case.

Also, a similarly certified paper, being the rule or process of the Referee upon this petition.

Also, a similarly certified paper, being the motion of M. J. Bray to dismiss. I call your Honor's attention to the fact that the Referee in his certificate states that this was filed on the first of October, 1916. That must be a clerical error. It must have been 1915.

I also offer a similarly certified paper, being motion of Jacob Eichel to dismiss, filed on the first day of October, 1915.

Also, a similarly certified paper, being the answer of M. J. Bray to this petition of the United States Fidelity & Guaranty Company.

Also, a similarly certified paper, being the answer of Jacob Eichel to the petition.

The Court:

What is the purpose?

Mr. Hall:

The purpose is to show that, as stated in the petition of the United States Fidelity & Guaranty Company, which I have now offered, the plaintiff in this case, United States Fidelity & Guaranty Company, seeks to have all of the distribution of the fund which was allowed and awarded by that court to these claimants, known as the Laura Eichel claimants, suspended. It seeks also to have that court decree that no money shall ever be paid on those claims to Bray or to Laura Eichel, or to any one.

The Court:

Was that petition filed after the decision of the Court of Appeals in this case?

Mr. Hall:

Yes, sir; it was filed on the 29th of June, 1915, as near as I can tell. There is no statement as to when it was filed, but the process, as it is called, was issued on it—the process or rule, whatever it may be—on the 29th of June, 1915.

Mr. Schoyer:

These offers are objected to as immaterial and irrelevant, and for the further reason that they introduce entirely extraneous matter into this case, and for the further reason that upon the argument before the Circuit Court of Appeals in the month of May, 1916, on the motion of the appellees for a rehearing or further hearing in this cause before the District Court, a certified copy

of the record of these same proceedings in West Virginia was presented to the Circuit Court of Appeals by counsel for the appellees, and the Circuit Court of Appeals had that whole matter before it and did not see fit in any way to change its previous mandate or decree, which was, as far as the West Virginia matter is concerned, that amounts awarded in West Virginia should be credited.

The Court:

It seems to me that this court, in the first instance, ought to overrule your objection, in order that the record may be introduced for such further disposition of the questions raised as may be proper. By so overruling the objection, I am not now determining the question as to the effect of such a proceeding on the part of the plaintiff in this case in West Virginia. I note an exception to defendants.

H. P. CAMDEN, a witness called on behalf of the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Hall:

Q. You are a member of the bar at Parkersburg, West Virginia?

A. Yes, sir.

Q. Are you the H. P. Camden whose name is signed to the original of Exhibits Nos. 5 and 6, being the answers of M. J. Bray and Jacob Eichel to a petition of the United States Fidelity & Guaranty Company, in the Evansville Bankruptcy case at Parkersburg?

A. I am the attorney who appeared for M. J. Bray and Jacob Eichel and filed answers for each, and my name was signed to the originals and these are certified as true copies, and I take them to be true copies, and I am that H. P. Camden.

Q. Has that proceeding, that matter involved in the petition and answer, been decided?

Mr. Schoyer:

Objected to as immaterial and irrelevant, and as introducing testimony which is not permitted by the mandate of the Circuit Court of Appeals.

The Court:

I will overrule the objection and note an exception to the plaintiff, the reason being that the matter ought properly perhaps to appear upon the record so that the questions may be ultimately disposed of.

Question read.

A. The matter was pending on a motion to dismiss, when I left home. It hasn't been decided unless the decision was handed down last Saturday or today, so far as I know.

CROSS EXAMINATION.

Mr. Schoyer:

Q You and Mr. Ambler, the attorney for the Surety Company, have been many times before the Referee in this matter, have you not?

A. Yes, sir, a a great many times.

Mr. Hall:

I offer in evidence the depositions of Jacob Eichel and M. J. Bray, taken in this case under the order of the court, the depositions filed August 21, 1916, taken before Adolf F. Decker, Notary Public, at Evansville, Indiana.

Mr. Schoyer:

Counsel for plaintiff renew the objections originally filed to the issuance of the commission, and to the interrogatories therein specifically objected to, and their exception to the answer of Jacob Eichel as heretofore filed.

The Court:

At this stage of the case, I will overrule the objection and note an exception for the plaintiff. My reason for so doing is that I believe that the matters ought to appear upon the record, so that they can be properly controlled afterwards.

Mr. Hall:

Counsel for defendants assumes that the record of the case up to this date is already before the court, and now makes a formal offer, with all the exhibits and testimony.

GEORGE N. SEAMAN, a witness called on behalf of plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr Schoyer:

Q. Where do you live?

A. North Side, Pittsburgh.

Q. What is your business?

A. Secretary and treasurer of the Nicola Building Company.

Q. In the year 1904 were you an officer of the Nicola Brothers Company?

A. I was assistant treasurer.

Q. In that connection, were you familiar with the books of the Company?

A. Yes, sir.

Book marked Plaintiff's Exhibit "A," also book marked Plaintiff's Exhibit "B," shown witness.

Q. I show you Plaintiff's Exhibit "A" and ask you what it is.

A. Sales ledger No. 17 of the Nicola Brothers Company.

Q. On page 310 of said ledger there appears to be an account of the Evansville Contract Company, Parkersburg?

A. Yes, sir.

Q. What does that show?

Mr. Hall: That is objected to.

Mr. Schoyer:

Q. Of what is this an account?

A. An account of shipments and payments of the Evansville Contract Company.

Q. To Nicola Brothers Company?

A. Yes, sir.

Q. And this account is carried forward from page 310 to page 169?

A. Yes, sir.

Q. What is the last date of sale of materials on that page?

A. October 22, 1903.

Q. Can you state within what period that material was delivered?

A. I can't say the exact date, but it would have been delivered within thirty days after that date.

Q. And the last entry in that account is under date of December 31, 1903, Evansville Contract Company, note account $10,313.03, is it?

A. Yes, sir.

Q. That was the amount of notes of the—

Mr. Hall:

I object to stating what the account is. The book is not any evidence against us.

Mr. Schoyer:

Q. I show you also Plaintiff's Exhibit "B," and ask you what that is?

A. Sales Ledger No. 18 of the Nicola Brothers Company.

Q. I call your attention to page 204, to the account with the Evansville Contract Company. That is the account as brought forward from page 169 of Ledger 17, is it not?

A. Yes, sir.

Q. And does that show the final settlement of this account with the Evansville Contract Company?

Mr. Hall:

Objected to, that the book is no evidence against us.

Objection overruled.

Exception noted.

Question read.

A. Yes, sir.

Mr. Schoyer:

Q. Do you know yourself if that is a correct statement of the account between the two companies?

A. Yes, sir.

Q. Are you acquainted with Mr. Jacob Eichel?

A. Yes, sir.

Q. Do you recall having negotiations with him some time in the spring of 1904, concerning the settlement of this account?

A. I don't recall anything definite. Mr. Eichel came into our office, and I am not clear whether I had the conversation with him or Oliver Nicola.

Q. At that time, according to these books, on the first of January, 1904, the claim of Nicola Brothers Company against the Evansville Contract Company was $11,149.40, was it not?

A. Yes, sir.

Q. And that was settled by the payment of $10,000 on April 13, 1904, was it not?

A. Yes, sir.

Q. Do you know who paid those checks?

A. I think that Mr. Eichel brought them in to the office. Whose checks they were I don't know.

Q. Do you know whether anything was paid by Mr. Eichel or anyone else, for the balance of that account?

A. Not while I had charge of the books.

Q. How long did you have charge after that?

A. Up until 1906 or 1907.

Mr. Schoyer:

Counsel for plaintiff offer in evidence Plaintiff's Exhibits "A" and "B," being these two ledgers, and particularly the accounts of the Evansville Contract Company on the pages noted.

Mr. Hall:

Objected to for the same reasons as stated before.

Objection overruled.

Exception noted.

CROSS EXAMINATION.

Mr. Hall:

Q. Don't you remember that at that time when Jacob Eichel dealt with you, there was drawn up and sworn to by an officer of your company, a proof of claim in the Evansville bankruptcy case?

A. I did not remember anything about that until Mr. Schoyer showed the affidavit to me several days ago.

Q. The proof of claim?

A. It was some paper, that I took the affidavit on as a Notary Public. Now, I believe it was the proof of claim.

RE-DIRECT EXAMINATION.

Mr. Schoyer:

Q. In this account on page 310 and 169, of Ledger 17, can you tell me what the figures 2,360 and the figures thereunder refer to in one of the columns?

A. They refer to the pages of the sales journal.

Q. And on the 31st of December, 1903, all but $836.37 of your claim against the Evansville Contract Company was in the form of notes, was it not?

A. Yes, sir.

Mr. Schoyer:

Counsel for plaintiff offer in evidence exemplification of record in the suit in the Superior Court of Vanderburg County, Indiana, March 1, 1916, No. 680, Madison J. Bray against Laura Eichel and Jacob Eichel, being Plaintiff's Exhibit "C." This suit is the one referred to and which Mr. Hall asked about in the depositions, which Mr. Bray has brought against the Eichels.

Testimony closed.

I hereby certify that the foregoing is a true transcript of all the evidence taken in the case of United States Fidelity & Guaranty Company vs. Laura Eichel, Jacob Eichel, Madison J. Bray and Philip W. Frey, at No. 188 May Term, 1913; together with the offers of counsel, objections thereto and the rulings of the court thereon.

LUCY DORSEY JAMES,
Official Reporter.
BY M. GANGWISCH.

Pittsburgh, Pa., December 7th, 1916.

I, Charles P. Orr, Judge of the District Court of the United States for the Western District of Pennsylvania certify that the foregoing is a correct transcript of all the evidence, offers of counsel, and the rulings of the court thereon, in the case of United States Fidelity & Guaranty Company vs. Laura Eichel, Jacob Eichel, Madison J. Bray and Philip W. Frey, at No. 188 May Term, 1913; all of which, so certified, is ordered to be filed and to become a part of the record, this 8th day of December, 1916.

CHAS. P. ORR,
Trial Judge.

Record in Indiana Suit. Bray v. Eichel.

Complaint.

Plaintiff complains of the defendants and says: that said defendants by their promissory note dated December 31, 1906, a copy of which note is filed herewith, promised to pay the plaintiff, upon demand, the sum of twenty-seven thousand thirty-seven and 39-100 dollars ($27,037.39), together with attorney's fees and interest; that a reasonable attorney's fee for plaintiff's attorney would be three thousand dollars ($3,000.00); that said note is due and wholly unpaid except the interest thereon, which is paid to December 31, 1914; that there is due the plaintiff upon said note the sum of thirty-three thousand dollars ($33,000.00).

WHEREFORE, the plaintiff asks judgment for thirty-three thousand dollars ($33,000.00) and all other proper relief.

WALKER & WALKER,
Attorneys for Plaintiff.

EVANSVILLE, IND., Dec. 31, 1906.

$27,037.39.

On demand after date, we or either of us promise to pay to the order of M. J. Bray twenty-seven thousand thirty-seven 39-100 dollars with attorney's fees, negotiable and payable at The City National Bank of Evansville, Ind., for value received, without relief from valuation or appraisement laws, with 3 per cent. interest after date payable semi-annually.

LAURA EICHEL,
J. EICHEL.

Complaint filed May 13, 1916.

Answer.

The defendants, for their separate and several answers to plaintiff's complaint herein, separately and severally deny each and every material allegation in said complaint contained.

FREY & WELMAN,
ISADOR KAHN,
Attorneys for Defendants.

Answer in General Denial, filed June 5, 1916.

Answer.

The defendants, for a further and fourth paragraph of separate and several answer to the plaintiff's complaint herein, separately and severally say:

That said plaintiff ought not to have and maintain his action herein because the said plaintiff and the said defendant, Laura Eichel, some time about the year 1904, entered into a partnership for the purchase of certain material claims allowed against the Evansville Contract Company, a corporation then in bankruptcy, in the Referee District in Parkersburg, West Virginia; that by a written agreement, a copy of which, marked Exhibit "A," is filed herewith and made a part hereof, it was agreed between the parties that said Madison J. Bray was to have one-half (½) of the profits realized from the purchase and collection of said claims; that said partnership is not settled, liquidated or dissolved.

WHEREFORE, defendants pray judgment for their costs herein.

FREY & WELMAN,
ISIDOR KAHN,
Attorneys for Defendants.

Answer.

The defendants, for a further and fifth paragraph of separate and several answer to the plaintiff's complaint herein, separately and severally say:

That under and by virtue of a written agreement a copy of which marked Exhibit "A" is filed herewith and made a part hereof, the said plaintiff, Madison J. Bray, undertook to collect certain moneys, and out of said collection reimburse himself to the amount of said note and pay the remainder of the proceeds, one-half (½) to himself and one-half (½) to the defendant, Laura Eichel; that said collection has not yet been made by said plaintiff and that said money has not yet been realized from said claims and that under the terms of said agreement the said note is not due.

WHEREFORE, defendants pray judgment for their cost herein.

FREY & WELMAN,
ISIDOR KAHN,
Attorneys for Defendants.

CROSS-COMPLAINT.

The defendants, and each of them, for a cross-complaint against the plaintiff herein, say:

That the plaintiff, Madison J. Bray, and this defendant, Laura Eichel, entered into a written agreement, a copy of which, marked "Exhibit A," is filed with this cross complaint and made a part thereof; that at the time of the execution of said agreement and said note, it was agreed and understood by and between the parties thereto that the consideration of said note was partly the agreement that the same should be collectable only out of the proceeds of said claims referred to in said Exhibit A. That by a mutual mistake of the parties said note omitted to read, as a part of the consideration, that said note was to be payable only out of the proceeds of said claims when collected, and that said agreement failed to state the full consideration, and that the note mentioned in said Exhibit A should be paid only out of the proceeds of the claims mentioned, when collected; that the mutual agreement and intention of the parties, at the time of the execution of the agreement and the note in question, was that said note and agreement should state that the same was to be collectable and payable only out of the proceeds of the collection of the claims mentioned in Exhibit A, and when they were paid.

WHEREFORE, the defendants pray that said note and agreement be reformed to state the said mutual agreement and intention of the parties, to-wit: That said note should be due only when said amounts mentioned in Exhibit A are paid and collected and only out of said proceeds; and that said agreement so state the intention of the parties that the note mentioned in said agreement shall be paid only in that manner, and for all other proper relief.

FREY & WELMAN,
ISIDOR KAHN,
Attorneys for Defendants.

Interrogatories.

The defendants, Laura Eichel and Jacob Eichel, jointly and severally, propound the following interrogatories to the plaintiff, Madison J. Bray, and ask that the court make an order requiring the same to be answered by said plaintiff under oath and within a reasonable time.

FREY & WELMAN,
ISADOR KAHN,
Attorneys for Defendants.

Interrogatory No. One—Did you not enter into an agreement with Laura Eichel for the purchase of certain claims against the Evansville Contract Company?

Interrogatory No. Two—Did you not agree to furnish the money for said purchase?

Interrogatory No. Three—Were you not to receive three per cent. interest on the amount advanced by you and also one-half of the profits of the enterprise?

Interrogatory No. Four—Do you not hold all the property of said enterprise in your hands and under your control?

Interrogatory No. Five—Did you not place them in the hands of Hall & Metcalf, attorneys, at Pittsburgh, Pa., for collection?

Interrogatory No. Six—Did you not have the defendant, Laura Eichel, execute an order to Messrs. Hall & Metcalf, attorneys, at Pittsburgh, Pa., to pay all the proceeds of said collection to you?

Interrogatory No. Seven—Was it not agreed between you and the said Laura Eichel, defendant, that you were to receive all the money collected from said claims and after said note and interest is fully paid, that you were to retain as profits in the transaction one-half of all the money received from said claims, over and above the face value of the note?

Answers to Interrogatories.

Madison J. Bray, having been sworn, makes the following answers to interrogatories propounded to him in the above entitled cause.

Answer to Interrogatory Number one: "Yes."

Answer to Interrogatory Number two: "I agreed to endorse for her for the money for that purpose."

Answer to Interrogatory Number three: "The agreement with Mrs. Eichel was in writing and she has a copy of it. The terms of the agreement are fully set out therein."

Answer to Interrogatory Number four: "I have the claims referred to in the contract in my possession; they are now in litigation."

Answer to Interrogatory Number five: "I put them into the hands of the firm you mention, to be collected. This I did at Mr. Eichel's request."

Answer to Interrogatory Number six: "She did give me such an order."

Answer to Interrogatory Number seven: "The contract shows what the agreement was."

MADISON J. BRAY.

Amendment to 4th Par. of Answer

The defendants for their amended fourth paragraph of separate and several answer to the plaintiff's complaint herein, separately and severally say:

That said plaintiff ought not to have and maintain his action herein because the said plaintiff and the said defendant, Laura Eichel, on or about the 31st day of December, 1906, entered into a partnership for the purchase of certain material claims allowed against the Evansville Contract Company, a corporation then in bankruptcy, in the Referee District in Parkersburg, West Virginia; that by a certain written agreement, a copy of which marked Exhibit "A" is filed herewith and made a part hereof, it was agreed between the parties that said Madison J. Bray, the plaintiff herein, was to have one-half of the profits realized from the purchase and collection of said claims; that said partnership is not settled, liquidated or dissolved.

WHEREFORE, defendants pray judgment for their costs herein.

FREY & WELMAN,
ISIDOR KAHN,
Attorneys for Defendants.

Exhibit A.

Lombard Iron Works, Augusta, Ga.	$ 2,166.30	$ 1,582.37
Variety Iron Works, Cleveland, O.	7,348.00	5,878.40
Clydesdale Stone Co., Pittsburgh, Pa.	6,185.33	3,606.30
C. D. Dotson, Parkersburg, W. Va.	2,084.08	1,771.47
The Monongahela R. C. C. & C. Co., Pittsburgh, Pa.	4,582.98	2,291.49
The Duncan & Porter Co.	460.00	368.00
Wickers & Vandevender, Parkersburg, W. Va.	3,000.00	2,797.42
E. L. Neal, Parkersburg, W. Va.	1,045.50	942.35
E. L. Oles, Pittsburgh	148.20	1323.38
S. E. Lime & Cement Co., Charleston, S. C.	2,806.00	2,500.00
C. C. Martin & Co., Parkersburg, W. Va.	372.15	334.94
Kramer & Son, Parkersburg, W. Va.	459.69	321.74
Parkersburg Mill Co., Parkersburg, W. Va.	5,005.59	4,509.53
	$35,663.82	$27,037.39

Now in consideration of M. J. Bray furnishing her the money to buy these claims, and at the low rate of interest of three (3%) per cent., for which money the said Laura Eichel has this day executed to M. J. Bray a note for $27,037.39, due on demand, with attorney fees, negotiable and payable at the City National Bank of Evansville, Indiana, without release from valuation or appraisement laws, with three (3%) per cent. interest per annum from date, payable semi-annually, and endorsed by Jacob Eichel.

It is hereby understood and agreed that the said claims now in the hands of Hall & Metcalf, attorneys, for collection, shall be held by the said Bray, who is to receive all money collected from said claims, and after said note and interest is fully paid, Bray is to retain, as his share of the

interests and profits of this transaction, one-half (½) of all the money received by him from said claims over and above the face of this note. The balance he is to apply to any indebtedness due to him by Laura Eichel, and in case there is no such indebtedness, either direct or by indorsement, to pay the balance to the said Laura Eichel.

LAURA EICHEL,
M. J. BRAY.

[NOTARY SEAL] ADOLPH DECKER,
Notary Public.

Fourth paragraph of Defendant's separate answer, filed June 5, 1916.

Evansville Contract Co.

Plaintiff's Exhibit "I" Nicola Bros. Account.

Sales Ledger 17, p. 310. PARKERSBURG, W. VA.

May	19	Lock 18	$ 353.37	June	5/27	By Frt.	$ 84.60
June	5/26	Lock 18	162.75		4	By Frt.	56.44
	5/29	Lock 18	382.20		19	By Frt.	114.55
					22	By Frt.	92.82
	2	Lock 18	261.95	July	6/24	By Frt.	80.50
	2	Lock 18	229.32		6/29	By Frt.	80.00
	15	Constitution, O.	239.32				
	16	Constitution, O.	307.73		17	B. R. 90 day	1,500.00
	25	Constitution, O.	238.98		6/10	Frt.	111.20
	29	Constitution, O.	241.71	Aug.	7/18		95.70
July	10	Constitution, O.	267.75		7/23		86.58
	11	Constitution, O.	382.20		7/31	B. R. 11/16/03	900.00
	24	Constitution, O.	438.48		5	Frt.	94.00
Aug.	7 31	Lock 18	342.40		3	Frt.	131.79
	6 19	Excess Frt.	21.05				
	11	Lock 18	330.12				3,549.69
	10	Glen Osborne Disc.	25.60			Bal. forward fol. 169.	$3,135.71
	17	Glen Osborne Disc.	304.20				
	18	Glen Osborne Disc.	264.60				
	18	Glen Osborne Disc.	277.20				
	20	Sewickley	34.20				
	21	Sewickley	299.52				
	19	Sewickley	411.71				
	24	Glen Osborne	299.52				
	24	Sewickley	299.52				
			$6,685.40				

1903.

Aug.		Balance brought forward.	Folio 310	$ 3,135.71	Oct.	1	By B. R. 12/3	110	$ 1,250.00
Aug.	25	Sewickley, Pf. 93, Car	12383, 2360	299.52		9/2	By Frt. 7964,	112	53.01
	25	Sewickley, Pf. 93, Car	19205 2360	299.52		8/29	By Frt 8077	112	56.16
	22	Sewickley, Pf. 4, Car	8297, 2369	282.88		1	By B. R 12/16	113	1 532.63
	24	Glen Osborne, Pf. 4, Car	166103, 2378	351.00		3	By B. R. 12/26	113	1,530.40
	30	Glen Osborne, Pf. 1, Car	1271 2393	238 00		8/27	By Frt. 12/32	115	100.28
Sept.	10	Glen Osborne, Pf. 161, Car	9463, 2474	233.48		8/27	By Frt 2094	115	99.59
	12	Glen Osborne, Pf 161, Car	1099, 2468	164.50	Nov.	2	By B. R. 4 Mo.	125	1,625.00
	10	Glen Osborne Pf. 4, Car	15375, 2498	215.99		5	By B. R. 4 Mo.	125	1,625.00
	14	Glen Osborne, Pf. 1, Car	5295, 2498	240.80		9	By B. R. 4 Mo.	125	1,625.00
	1[illegible]	Osborne, Pf. 4, Car	5345, 2505	430.58		12	By B R. 4 Mo.	125	1,625.00
		Glen Osborne, Pf. 161, Car	22005, 2528	234.00		12/3	By B. R. 90 Da	127	750.00
	16	Glen Osborne, Pf. 161, Car	5535, 2529	258.47	Dec.	16	By B. R. 90 Da.	132	1,532.63
	19	Glen Osborne, Pf. 4, Car	193905, 2557	193.53		26	By B R. 90 Da.	132	1,530.40
	23	Glen Osborne, Pf. 1, Car	2561, 2560	217.00					—/—
	24	Glen Osborne, Pf. 4, Car	64545, 2569	388.50					$14,935.10
	25	Glen Osborne, Pf. 161, Car	7856, 2579	303.48					
Oct.	1	Glen Osborne, Pf. 307, Car	469483, 2617	463.41	Jan.	31	Bal.		
	3	Glen Osborne, Pf. 307, Car	117466, 2627	365.58			Forward, L. 18		$11,149.40

	2	Glen Osborne, Pf.	4, Car	5158,	2632	337.50
	8	Glen Osborne, Pf.	4, Car	3569,	2659	337.50
	8	Glen Osborne, Pf.	4, Car	9910,	2674	243.75
	14	Cash	Car	6965,	50	1.250.00
	13	Glen Osborne, Pf.	16, Car	1919,	2699	234.00
	13	Glen Osborne, Pf.	4, Car	4341,	2703	279.45
	14	Glen Osborne, Pf.	161, Car	15764,	2704	252.72
	22	Glen Osborne, Pf.	307, Car	2766	, 2766	437.76
	22	Glen Osborne, Pf.	4, Car	3211,	2770	269.81
Nov.	30	Cash	Car	7334,	59	750.00
Dec.	24	Cash 836.37	Car	7580,	66	3,063.03
	31	$11,149.40 Evansville C. Co.	Note apc.			10,313.03
						$26,084.50

SALES LEDGER.
Ledger 18, Page 204.
1904.

PARKERSBURG, W. VA.

Feb.	1	Bal. brot. ford. Leg. 17, 169.	$11,149.40	Apr.	13	By Cash 2 cks. 68. .	$10,000.00
			11,149.40	Jan.	31	By expense 244	1,149.40
							$11,149.40
Jan.	31	To Expense 288	1,149.40				
				Jan.	31	Suspended Acct. 228. . . .	$ 1,149.40

Exhibit in B. A. Nicola Case as Sued On.

Evansville Contract Co., Evansville, Ind., in account with Nicola Bros. Co., Pittsburgh, Pa.

For material (lumber) delivered to Lock No. 18, Ohio River, as follows:

1903.	Car No.	Amount.	Freight.
May 19th,	30045	$353.37	$84.60
" 26th,	12611	162.75	56.44
" 29th,	3677	382.20	93.50
June 2nd,	30843	261.95	92.82
" 2nd,	12244	220.32	111.20
" 15th,	15586	239.32	81.50
" 16th,	64492	307.73	80.00
" 25th,	167694	238.98	94.60
" 29th,	8079	241.71	95.77
July 10th,	54273	267.75	86.58
" 11th,	6670	382.20	119.84
" 24th,	30117	438.48	131.79
" 31st,	12132	342.40	100.28
Aug. 11th,	2094	330.12	99.59
		$4,178.28	$1,328.51
Less Freight as above—		1,328.51	
		$2,849.77	

Less Payments on account:

Oct. 15th,	$250.00	
Nov. 16th,	900.00	
Dec 3rd,	500.00	
		1,650.00
		$1,199.77

Opinion of District Court.

FILED NOVEMBER 8, 1916

ORR, J.

The Court of Appeals of the Third Circuit has remitted this case to this court with instructions to enter a decree in accordance with the opinion of that court. (United States Fidelity & Guaranty Company vs. Laura Eichel, et al., 219 Fed. 803.)

It is clear that this court must follow the directions of the mandate. It is equally clear that this court should consider and decide all matters left open by the mandate. (In re Sanford Fork & Tool Company, 160 U. S. 247.)

The duty of this court is to determine the amount of money which Laura Eichel is entitled to recover from the plaintiff hereinafter referred to as the Surety Company.

The Court of Appeals sustained the proposition of the Surety Company that the latter was not liable to Laura Eichel for the face value of the claims purchased by her, but was entitled to recover the sums actually paid by her, from the aggregate of which, however, there should be certain deductions. These deductions relate: 1. To the claims of the Clydesdale Stone Company; 2. To the claim of the Pittsburgh Trolley Pole Company; 3. To the claim of Nicola Brothers Company, and 4. Whatever sums have been awarded by the Bankruptcy Court in West Virginia. There was also left to this court the subjects of interest and of costs in this court.

A further hearing was had upon which there was introduced evidence on behalf of both parties.

1. The claim of the Clydesdale Stone Company: Due to an improper application of payments by the Stone Company, a wrong balance was reached in so far as the liability was intended to be created against the Surety. That portion of the Stone Company's balance against the Evansville Contract Company, for which the

Surety Company is liable, is found to be $1,333.94 with interest from July 1, 1904, which is the date when the claim was assigned by the Stone Company. Laura Eichel was engaged in the purchase of claims for which the Surety Company would be liable. In order to purchase the claim of the Stone Company against the Evansville Contract Company and thus acquire the portion of the claim for which the Surety Company would be liable, she was required to pay to the Stone Company more than the amount which the Surety Company would have been required to pay to the Stone Company. Therefore, as Laura Eichel paid more money than the Surety would be required to pay, she should be entitled to recover from the Surety, the amount which the Surety might be called upon to pay. It is urged on behalf of the Surety Company that inasmuch as the Stone Company's total claim of $5,967.23 was purchased by Laura Eichel for $3,606.30, that the portion of said claim for which the Surety was liable, to-wit: $1,333.94, should be reduced in the same proportion or to the sum of $806.17. This, however, should not be, because Laura Eichel was not buying claims against the Contract Company which sureties other than the United States Fidelity & Guaranty Company might be called upon to pay. There was no intention to make a profit at the expense of any person but the Surety Company in this case. If she were to be fully repaid the entire sum advanced by her, to the Stone Company, a different question would arise, but there is no evidence tending to show that fact and the burden of proving the same naturally rests upon the Surety Company. So far we have considered the assignment of the claim of the Clydesdale Stone Company without regard to any decree of distribution of the Bankrupt estate of the Evansville Contract Company. It may be further referred to when we consider the credits upon the claim of Laura Eichel by reason of the sums awarded by the Bankruptcy Court in West Virginia.

2 and 3. The claims of the Pittsburgh Trolley Pole

Company and of Nicola Brothers Company may be considered together. They are to be allowed against the Surety in the sums paid therefor respectively. The claims of these two creditors of the Evansville Contract Company, as well as the claim of the Clydesdale Coal Company just considered, had been filed with the Referee in Bankruptcy prior to their respective assignments. The proof of debt in each case was for a balance claimed to be upon an account. Giving some weight to the probative force of the proofs of debt filed in Bankruptcy, as well as due weight to the testimony in this case, there was due by the Bankrupt, to the Pittsburgh Trolley Pole Company, the sum of $634.20. This was assigned by the Trolley Pole Company on April 16, 1904, at a discount of 15 per cent. The claim of Nicola Brothers Company against the Bankrupt was $1,199.77. This claim was sold by the creditor at a discount of 15 per cent. on April 15, 1904. The court finds, therefore, that for the claim of the Pittsburgh Trolley Pole Company, Laura Eichel paid $539.07, which sum she is entitled to recover with interest from April 16, 1014. The court finds that for the claim of Nicola Brothers Company, Laura Eichel paid the sum of $1,019.81, which sum, with interest from April 15, 1904, she is entitled to recover. These two claims have been considered without reference to the decree of distribution in the Bankruptcy Court in West Virginia which will be the subject of consideration hereafter.

4. The sums awarded by the Bankruptcy Court in West Virginia. The Court of Appeals in the opinion herein before referred to contains the following instruction: "Whatever sums have been awarded by the Bankruptcy Court in West Virginia on account of these claims should of course, be credited, and such other credits should be given as may be necessary when the claims specially referred to herein are adjusted." That opinion also quotes at considerable length from the opinion of the Referee in Bankruptcy and from the opinion of the District Court sustaining the action of the Referee and refers to an order dis-

tributing the assets of the bankrupt's estate and awarding a dividend of 66 2-3 per cent. calculated on the amount that had been paid for the claims and not on their face. It is unfortunate for the Surety Company in the present proceeding that the decree of the Bankruptcy Court has been suspended if not yet altered at the instance of the Surety Company since the decision of the Circuit Court of Appeals of this Circuit. The Court of Appeals, without doubt, considered that the distribution by the Bankruptcy Court and the awards to the several claims purchased by Laura Eichel included therein were permanently fixed so far as the Surety Company was concerned. The Court of Appeals was, without doubt, justified in assuming that the several sums distributed to the claims and based upon 66 2-3 per cent. of the amounts paid for them, which the Surety Company was insisting should be treated as credits upon the amount to be found due to Laura Eichel in the present proceeding, would at least be unchanged by any act of the Surety. It appears that the Surety on or about the 29th day of June, 1915, filed a petition in the Bankruptcy proceeding in the nature of a bill in equity to secure to it, out of the funds in the hands of the trustees, indemnity for large expenditures and other liabilities. The bill is very long and contains many prayers; to state its substance even would extend this opinion unduly. The following extracts from the bill throw sufficient light upon the action of the Surety in having the proceedings reopened.

> "The further prayer is that the court will ascertain the cost of the said claims of Nicola Bros. Co., $1,199.77, and of Pittsburgh Trolley Pole Co., $634.20, and allow the same at the actual cost, and order and adjudge and decree the amounts recoverable thereon are the property of said Jacob Eichel," etc.

> "And the further prayer is that the amounts or amount found against the said M. J. Bray, in

his own right or as Trustee, on account of moneys recovered or received in the said Court of Claims shall be deducted from whatever amount or amounts shall have heretofore been or may hereafter be decreed upon the several claims against the estate of the Bankrupt allowed in the name of the said Laura Eichel and the proceeds of which have heretofore been decreed to be paid to the said M. J. Bray; that out of any moneys coming to the said M. J. Bray in this matter or proceeding, after making good and accounting for the amounts collected by him on the judgments rendered in the Court of Claims above set forth; that if there should be any surplus or excess payable on claims heretofore allowed in favor of Laura Eichel or the said Bray, then there should be paid out of such surplus such amount as will be necessary to satisfy the proportion due from the Banks which the said Bray has agreed to indemnify against their liability under the indemnity bond of April 4th, 1904."

"And the petitioner prays likewise that out of any fund, if any, in the hands of this court to which the said Jacob Eichel may be entitled, there shall be charged whatever may be found against him on account of moneys received from the several judgments rendered by the said Court of Claims, and if, after charging the same, there be any surplus to which the said Eichel will be entitled, then that he be charged with and there be deducted from the same such amount as may be necessary to satisfy the proportion assessable against any Bank or Banks which the said Eichel has agreed to indemnify.

"Petitioner further prays that the court will direct the enforcement of the decree heretofore entered in this cause by the Referee under date of

January 4th, 1913, for the distribution of the funds as decreed; the sum of $1,150 decreed in favor of your petitioner as part of the administration charges for premiums on bonds; unto the Riter-Conley Co. of Pittsburgh, Pa., amounting to the sum of $4,946.24 and also unto Rardin & Co., the sum of $333.76, but that the payment be suspended and stayed as to all other claims directed to be paid, that is to say: All the claims held by the said M. J. Bray, and also the two claims of the Pittsburgh Trolley Pole Co., the principal of which is $634.20, and the claim of the Nicola Bros. Co., of which the principal is $1,199.77—until the court shall have disposed of and determined the proper distribution and payment of the same."

The said bill has been entertained by the court.

The decree proposed to be affected by the proceeding just mentioned is the decree of January 4, 1913, entered by the Referee which was affirmed by the District Court of the United States for the Northern District of West Virginia. That decree, as appears from the bill filed on June 29, 1915, found that the claims which are under consideration in this court, excepting the claims of the Pittsburgh Trolley Pole Company and Nicola Brothers Company, were held by M. J. Bray as *collateral security* for certain indebtedness due him from Laura Eichel, and directed that the dividends on the claims aforesaid be paid to said Bray or his attorney. It now appears that the Surety Company seeks to have the moneys which Bray was entitled to receive as pledge of Laura Eichel applied directly to the payment of Bray's own liabilities to the Bankrupt estate or to the Surety of said Bankrupt. In other words, it seeks to have that court convert that which is Bray's qualified title or property into an absolute title or property, thus determining the rights of Bray and Laura Eichel as against each other.

So with the claims of Nicola Brothers Company and the Pittsburgh Trolley Pole Company, the Surety in that proceeding seeks to have it determined that they are the property of Jacob Eichel and not of Laura Eichel, and to have the same applied to the indebtedness of Jacob Eichel to the Bankrupt estate. In view of these facts, this court cannot allow credits for the awards in West Virginia. Had any moneys been paid to Laura Eichel out of the funds in the Bankruptcy Court, they would have to be credited upon her claim in this case, but when, by the act of the Surety, it is made to appear doubtful whether any of the moneys will be paid to Laura Eichel out of the registry of the Court of Bankruptcy, it is impossible to allow credit therefor. That act of the Surety is so inconsistent with the theory and prayer of the bill filed by it in this court whereby it sought to have this court take "full and complete jurisdiction in the matter in controversy between your orator and the said Laura Eichel and the other defendants and determine what, if any, your orator is liable to pay because of its being a surety on the said bonds so that all the controversies between the parties thereto may be determined in this one proceeding" that it ought not to be heard to complain that the sums awarded in the Bankruptcy Court are not now to be credited upon the sums due to Laura Eichel. This conclusion is not avoided by the fact established by evidence on the part of the Surety that M. J. Bray has brought suit against Laura Eichel and Jacob Eichel upon the note for $27,037.39, dated December 31, 1906, which appears in evidence in the case at bar, which action is being defended and is undetermined.

It is also insisted on the part of Laura Eichel that there should be recovered also certain expenses paid and incurred by the defendants in the purchase of the claims and in endeavoring to collect them. Beginning with May 20, 1907, Laura Eichel paid to Attorneys and others sums aggregating $1,182.36. Beginning with September 9, 1907, M. J. Bray made payments of the same character, for

which he looks to Laura Eichel, amounting to $2,542.27. It is unnecessary to set forth the details of such payments. In view of the opinion of the Court of Appeals that the conduct of the defendants, including Laura Eichel, in the purchase of the several claims cannot be sanctioned, no one of the defendants is entitled to recover expenses incurred in endeavoring to collect them at their face value. Had their conduct been such as the court would approve, a different question would be presented. As the matter now stands it does not appear that any of the expenses would have been incurred had it not been for the plan to buy the claims at a discount and to profit thereby to the prejudice of the Surety. As the appellate Court has found that there was a violation of trust upon the part of Bray with which the Eichels were associated, and in which they were interested, all must be treated alike in respect to allowances for expenses. We have never believed that one who has attempted to carry through a breach of trust should be allowed his expenses incurred in such effort. He is, however, allowed such sums as the trust estate would have been obliged to pay for its protection. The moneys paid by Laura Eichel or on her behalf, to the various creditors, with interest thereon from the several dates of the respective payments, are therefore the only moneys she is entitled to have repaid.

The following is the schedule of all the claims paid by or on behalf of Laura Eichel, showing the amounts paid therefor respectively and the dates of the several payments from which interest shall be calculated:

Claim.	Amounts Paid.	Dates of Payment.
E. L. Neale	$ 942.35	July 6, 1904
C. D. Dotson	1,771.47	June 10, 1904
Monongahela R. Cons. Coal & Coke Co.	2,291.49	June 13, 1904
Lombard Iron Works	1,582.37	May 28, 1904
Wickers & Vandevender	2,797.42	July 1, 1904

Variety Iron Works	5,878.40	June	1, 1904
C. C. Martin & Co.....	334.94	Oct.	14, 1904
Parkersburg Mill Co.....	4,505.53	July	27, 1904
Duncan Porter Company	368.00	June	15, 1904
S. Eastern Lime & Cement Co..	2,500.00	Sept.	3, 1904
Clydesdale Stone Co.....	1,333.94	June	1, 1904
Cramer & Son.....	321.74	Nov.	21, 1904
E. L. Oles	125.05	July	22, 1904
Pgh. Trolley Pole Company....	539.07	Apr.	16, 1904
Nicola Brothers Co.....	1,019.81	Apr.	15, 1904

The only remaining matter is to dispose of the costs in this court in accordance with the opinion. Under all the circumstances of the case, the costs in this court, in this proceeding, should be paid by the plaintiff. It should also pay the costs in the several actions at law recited in the bill, with the exception of the costs in two of the actions at law brought upon the assigned claims of the Clydesdale Stone Company.

Let a decree be presented requiring the plaintiff to pay to Laura Eichel the aggregate amount of the sums paid for the several claims, including interest from the several dates of payment as shown by the schedule hereinbefore set forth, and let the decree otherwise conform with this opinion.

Petition of Laura Eichel for Re-Trial, Etc.

FILED NOVEMBER 10, 1916

The defendant, Laura Eichel, prays the court for a new trial and rehearing and reargument in this case for the following causes, all of which appear on the record:

1. The opinion of the court is not in conformity with the opinion of the Court of Appeals and the decision of this court should be made on the fundamental idea of the opinion of the Court of Appeals, to wit, that nothing should be excluded in the recovery of Laura Eichel except any share of Bray in the profits of the transaction of the purchase of claims. This idea is to be found in the opinion of the Court of Appeals in the following language: "Assuming that she may not be bound, we have considered the evidence independently and agree with the appellant that Bray, Frey and the Eichels were parties to a plan to buy the claims at a discount in order that Bray might share in the profits of the transaction, and we agree also that a court of equity cannot sanction such conduct." It does not appear in the opinion of the Court of Appeals that there is any intent or decision to take from Laura Eichel any share in the so-called profit, and therefore the trial court should find what Bray's profit is and exclude that only.

2. The court should not find a profit without first taking into account expenses and allowing for expenses in the purchase of the claims, and as this has not been done by the court, no ascertainment of profit has been made.

3. That Laura Eichel paid for the Clydesdale Stone Company claims $3,606.30, and as she is allowed but one of her claims, namely, the one for $1,333.94, in ascertaining the profit on the purchase of these claims she shuold be allowed the loss on the Clydesdale Stone Company claims, to wit, the difference between $3,606.30 and $1,333.94.

4. The court should have found that the following matter, not having been considered by the Court of Appeals, vitally affects this case, namely, that in the bill filed in this case by the plaintiff, as appears by page 8 of the printed record, the plaintiff did know that Jacob Eichel was buying these claims, and they agreed that Jacob Eichel should buy them, and this is the position of the plaintiff and they cannot now recede from it, no matter if the real situation was, as found by the District Court, that Laura Eichel was buying the claims. That in this view of the case, claims were being bought for the ease and benefit of the plaintiff and it cannot now repudiate this position.

5. The facts in regard to the Clydesdale Stone Company cases were not fully developed in the Court of Appeals, and the analysis of these facts shows that the appropriate application by the creditor was unassailed by the debtor or the surety, and the creditor had the right to apply payments as it did, namely, to the Merrill job. This being the fact, the rule of law supports such application.

6. As it appears that the Clydesdale Stone Company claim was allowed in full at the instance of the plaintiff in the bankruptcy proceeding at Parkersburg, the plaintiff cannot now repudiate this in this case.

LAURA EICHEL.
By her Attorney, WM. M. HALL.

And now November 10, 1916, this petition is presented and refused with an exception noted for the benefit of Laura Eichel. PER CURIAM.

DECREE.

FILED DECEMBER 6, 1916

December 6, 1916, this case having come on to be heard on the 16th day of October, 1916, the court on that date proceeded to the trial of the case, taking the testimony of witnesses orally in open court and by depositions duly taken and offered, the court having taken and reported all of the testimony so as to clearly show the character of the evidence, the form in which it was offered, the objections made, the rulings and exceptions, the trial having been duly closed and the case argued by counsel for the plaintiff and for the defendants, upon consideration thereof, it is now ordered and decreed that the plaintiff, the United States Fidelity and Guaranty Company, a corporation of the State of Maryland, is liable to pay unto the defendant, Laura Eichel, the sum of forty-five thousand nine hundred forty-two and 42-100 ($45,942.42) dollars, which sum is now due and payable, with interest from December 6th, 1916, and it is ordered and decreed that the plaintiff now pay said sum to said Laura Eichel with interest from December 6th, 1916, said sum being the amount said plaintiff is liable to pay to said Laura Eichel because of the plaintiff's being surety on the bonds named in the plaintiff's bill of complaint, and the plaintiff shall pay to the defendant, Laura Eichel, the sum of two hundred eighteen and 4-100 ($218.04) dollars, being the costs now taxed in the actions Nos. 42 to 57, both inclusive, November Term, 1907, of this court, the defendant to pay the costs in Nos. 24 and 25 November Term, 1907, in the amount of twenty-seven ($27) dollars.

The claims making up said amount are as follows:

Name	Amt. of Claim	Interest	Total
E. L. Neale	$ 942.35	$ 702.05	$ 1,644.40
C. D. Dotson	1,771.47	1,327.36	3,098.83
Monongahela River C. C. & C. Co.	2,291.49	1,715.41	4,006.90
Lombard Iron Works	1,582.37	1,188.83	2,771.20
Withers & Van Devender	2,797.42	2,086.88	4,884.30
Variety Iron Works	5,878.40	4,413.50	10,291.90

C. C. Martin & Company	334.94	244.04	578.98
Parkersburg Mill Co.	4,505.53	3,340.85	7,846.38
Duncan & Porter Company	368.00	275.45	643.45
S. E. Lime & Cement Co.	2,500.00	1,826.25	4,326.25
Clydesdale Stone Company	1,333.94	1,001.52	2,335.46
Cramer & Son	321.74	232.46	554.20
E. L. Oles	125.05	92.82	217.87
Pittsburgh Trolley Pole Co.	539.07	408.88	947.95
Nicola Brothers Company	1,019.81	773.53	1,793.34
	$26,311.58	$19,630.83	$45,912.41

The said Laura Eichel shall allow a credit on said amount to be paid her by the plaintiff in the amount of $790.93, the costs awarded the plaintiff in the Court of Appeals in this case, with interest from the 23rd of December, 1915, to date, making $836.14.

The prayers of the plaintiff in its bill of complaint, except in so far as embraced in this decree for the payment of said sums to Laura Eichel, are hereby denied.

The plaintiff to pay the costs of this case, including the costs of the defendants. PER CURIAM.

Defendants' Petition for Appeal.

FILED DECEMBER 8, 1916

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The above named Laura Eichel, Madison J. Bray and Philip W. Frey, appellants, deeming themselves aggrieved by the decree entered in the above entitled case, on the 6th day of December, 1916, do hereby appeal from said decree and pray that an appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree entered, duly authenticated, may be sent to the United States Circuit Court of Appeals.

WM. M. HALL,
Attorney for said Appellants,

And now December 8th, 1816, it is ordered that the appeal be allowed as prayed for, and that a bond in the sum of five hundred ($500) dollars, to be approved by the Court, be filed by said appellants. Appellants' assignments of error presented to the Court this day and ordered to be filed.

CHAS. P. ORR,
U. S. District Judge.

Defendants' Assignments of Error.

FILED DECEMBER 8, 1916

And now, December 8th, 1916, come the defendants, Laura Eichel and Madison J. Bray, and Philip W. Frey, by their attorney, William M. Hall, and say that the decree entered in the above case on the 6th of December, 1916, is erroneous and unjust to them:

FIRST. Because, as appears from the record in this case, the defendant, Laura Eichel, was entitled to and should have been granted a decree in the sum of $66,534.20 against the plaintiff, this being the full amount of her claims sued on with interest from their respective dates to the 6th day of December, 1916, the principal of said claims aggregating, as found by this court, $37,584.08, and the interest from their respective dates to December 6th, 1916, aggregating $28,950.13.

SECOND. Because, as appears from the record in this case, the Court of Appeals directed the District Court to enter a decree in accordance with the opinion of the Court of Appeals, and in that opinion the court goes no further than to decide that the court will not approve anything by which "Bray might share in the profits of the transaction." The District Court has, by its decree and opinion, gone further than this and stricken out Laura Eichel's half or share in the so-called profits, and no matter what the claim of Bray may be, Laura Eichel is entitled to her share, which has not been allowed her.

THIRD. Because, as appears from the record in this case, this being a question of profits, the District Court has not taken an account of profits and should have allowed, first, a reasonable attorney's fee for collection, as the claims at the time Bray became interested in them (December, 1906) were in the hands of attorneys for collection; second, what Bray and Laura Eichel paid out in expenses, to wit, Laura Eichel, $1,182.36; Bray, $2,542.27; and third, by

the note and agreement of December, 1906, between Bray and Laura Eichel, Bray only got three per cent. interest on the amount for which he was liable as endorser, to wit, $27,037.39, and never can get any more than that in his dealings with Laura Eichel. He gave a quid pro quo for the so-called profit, and after this lapse of time there is no profit, and at the time the agreement was made long litigation was in contemplation.

FOURTH. Because, as appears from the record in this case, these claims were purchased in the year 1904, and there nowhere appears in the record, nor is it a fact, that Bray was interested in these claims at that time, and it nowhere appears in the record that he became in any way interested until December, 1906, and the agreement between him and Laura Eichel by which he was then (December, 1906) to loan her his credit to carry a loan in bank or in his own hands does not come within the rule forbidding a trustee to make profit, and it is not a correct deduction of law to hold it a profit.

FIFTH. Because, as appears from the record in this case, there never was an application by the debtor, the Evansville Contract Company, in the Clydesdale Stone Company account, and the Clydesdale Stone Company had an unquestioned right to make the application as it saw fit or as suited its convenience, and having done so to the payment of the account on the Merrill Dam job, it is not within the right of the surety to object, and the refusal to sustain the two Clydesdale Stone Company cases at Nos. 24 and 25 November Term, 1907, aggregating $4,451.17, was erroneous. The denial of this claim strikes down the absolute right of the Clydesdale Stone Company to make the application.

SIXTH. Because, as appears from the record in this case, Laura Eichel paid to the Clydesdale Stone Company $3,606.30. The court has allowed her but $1,333.94. If this is a question of profit, the rule should be applied so as to

reimburse her for what she has paid. Under the decree, the court, instead of shaping the decree so as to prevent any profit to either Bray or Laura Eichel, which is at the outside the extent of the opinion of the Court of Appeals, has brought Laura Eichel out a loser in the transaction to the extent of $2,272.36.

SEVENTH. Because, as appears from the record in this case, the plaintiff's bill of complaint contains and is founded upon the allegation of the plaintiff that Jacob Eichel, the husband of Laura Eichel, made an agreement with it, the plaintiff, by which he was to be permitted to buy these claims, this position of the plaintiff therefore being inconsistent with any denial on its part of knowledge and of consent that the claims could be bought, and this position was not brought to the attention of the Court of Appeals on the argument of this case, although it was in the record, and the District Court should have considered it.

EIGHTH. Because, as appears from the record in this case, this being an interlocutory decree of the Court of Appeals, the District Court had the discretion and it was its duty to retry the case in full, the defendants having the right to have the case reheard in full on all points on appeal, the Court of Appeals not being bound to consider final its decision in an interlocutory decree upon the final hearing of the case.

NINTH. Because, as appears from the record in this case, in the Pittsburgh Trolley Pole Company claim and Nicola Brothers claim, Laura Eichel did not buy these claims—they were bought by William Eichel, her son.

TENTH. Because, as appears from the record in this case, at the instance of the plaintiff, there was awarded by the United States District Court for the Northern District of West Virginia, in the bankruptcy of the Evansville Contract Company, in the distribution of the funds of that estate, on the Clydesdale Stone Company claims the total amount thereof, $6,185.35, as a preferred or lien claim, and

it is not now proper for the plaintiff to repudiate that in this case. That amount was awarded for its benefit on its position that it was bound to pay that much money.

ELEVENTH. Because, as appears from the record in this case, any profit of Bray, Trustee, should go to the estate of the Evansville Contract Company in bankruptcy for distribution to its creditors and not to this surety, the plaintiff.

TWELFTH. In awarding the costs in the two Clydesdale Stone Company cases, $27, to be paid by the defendant.

THIRTEENTH. In awarding the costs of the Court of Appeals case to be paid by the defendant.

In order that the foregoing assignments of error may be and appear of record, Laura Eichel, Madison J. Bray, and Philip W. Frey, appellants, present the same to the court and pray that disposition may be made thereof in accordance with the law in order that their appeal may be heard.

LAURA EICHEL,
MADISON J. BRAY,
PHILIP W. FREY.

BY WM. M. HALL,
Their Attorney.

Petition of Plaintiff for Appeal to the Circuit Court of Appeals.

FILED DECEMBER 21, 1916

To the Honorable, the Judges of the District Court:

The above named The United States Fidelity & Guaranty Company, deeming itself aggrieved by the decree entered in the above entitled cause on the 8th day of December, 1916, does hereby appeal from said decree and pray that an appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was entered, duly authenticated, may be sent to the Circuit Court of Appeals.

The United States Fidelity & Guaranty Company.
By Wm. E. Schoyer,
Solicitor.

Appeal allowed upon giving bond in the sum of $60,000.00, said bond when approved to act as a supersedeas.
December 21, 1916.

Chas. P. Orr,
Judge.

Plaintiffs' Assignments of Error.

FILED DECEMBER 21, 1916

AND NOW, December 21st, 1916, comes the plaintiff, by its Solicitor, William E. Schoyer, and says that the decree entered in the above cause on the 8th day of December, 1916, is erroneous and unjust to plaintiff for the following reasons:

FIRST. It was error to decree that the portion of the claim of the Clydesdale Stone Co. against the Evansville Contract Co., bankrupt, for which this plaintiff was liable, should b eallowed at the face value of said portion, or $1,333.94, when it appears that the whole claim of the Stone Company against the Contract Company of $5,967.23, including said sum of $1,333.94, had been bought for $3,606.30.

SECOND. It was error not to reduce the said claim of the Clydesdale Stone Co. of $1,333.94 by the same rate of discount at which the total claim of the Stone Company was bought, or to the sum of $806.17.

THIRD. It was error to decree that $1,019.81 or any sum whatever had been paid to the Nicola Bros. Co. for the assignment of its claim to William Eichel.

FOURTH. It was error to decree that $539.07 or any sum whatever had been paid to the Pittsburgh Trolley Pole Co. for the assignment of its claim to William Eichel.

FIFTH. It was error not to decree that the payment by the trustees in bankruptcy of the Evansville Contract Co. on April 13, 1904, of the sum of $10,000.00 to the Nicola Bros. Co., compelled a disallowance upon any balance due that company from the bankrupt or its surety, inasmuch as said payment constituted an illegal preference to that company.

SIXTH. It was error not to entirely disallow the claims of the Pittsburgh Trolley Pole Co. and the Nicola Bros. Co.

SEVENTH. It was error to hold that Laura Eichel had anything to do with the purchase of the Nicola Bros. Co. and Pittsburgh Trolley Pole Co. claims or paid anything therefor.

EIGHTH. It was error not to credit upon the claims allowed the amounts awarded by the Bankruptcy Court of West Virginia as directed by the mandate of the Circuit Court of Appeals in this cause.

NINTH. It was error to admit in evidence over the objection of the plaintiff, the record of the proceedings instituted in June, 1915, by the plaintiff in the Bankruptcy Court of West Virginia to compel Bray and Jacob Eichel to repay to the bankrupt estate of the Evansville Contract Co., moneys alleged to have been unlawfully taken by them, and to withhold distribution of the fund in said court pending settlement of the controversy thereby raised.

TENTH. It was error to hold that the said West Virginia proceedings instituted by the plaintiff made it impossible to allow the credit directed by the mandate of the Circuit Court of Appeals.

ELEVENTH. It was error to decree that the amounts of the several claims, save those of Nicola Bros. and Pittsburgh Trolley Pole Co., should be paid to Laura Eichel, and in not holding that they should be paid to M. J. Bray, it being shown by the record (old record, page 121) that under arrangement made between them under date of December 31, 1906, Bray should first be paid the cost of the claims, and she was to have only one-half of the excess of costs by way of profits.

TWELFTH. It was error not to decree that the amounts of the several material claims save those of Pittsburgh Trolley Pole Co. and Nicola Bros. Co. should be paid to M. J. Bray as decreed by the Bankruptcy Court in West Virginia on January 4, 1913, instead of to Laura Eichel, these claims having been put in her name with the

understanding that if anything was recovered beyond costs and expenses, then she was to have one-half the profits.

THIRTEENTH. It was error to decree that the plaintiff should pay the costs in the actions at law, Nos. 42 to 57 November Term, 1907.

FOURTEENTH. It was error to decree that the plaintiff should pay the costs in this proceeding.

FIFTEENTH. It was error to decree that interest should be paid upon the amounts paid for the claims purchased by Bray, Frey and the Eichels.

SIXTEENTH. It was error, in any event, not to decree that interest should not accrue after January 4, 1913, as to amount awarded upon these claims in the bankruptcy court in the Northern District of West Virginia on that date.

SEVENTEENTH. It was error to overrule plaintiff's objection that a commission to take testimony should not issue on behalf of the defendants until they had paid the costs of the appeal to the Circuit Court of Appeals as directed by the mandate of that court.

In order that the foregoing assignments of error may be and appear of record, the plaintiff presents the same to the court and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided.

All of which is respectfully submitted.

WM. E. SCHOYER,
Solicitor for Plaintiff.

Stipulation as to Record.

FILED DECEMBER 16, 1916

It is stipulated as follows as to what shall be the contents of the record in this case in the Court of Appeals:

(1) The record on the appeal of the plaintiff in the Court of Appeals, as printed for the Supreme Court, now remaining in the Court of Appeals, need not be reprinted.

(2) Docket entries including and since the mandate of the Court of Appeals.

(3) Depositions of Jacob Eichel and M. J. Bray, filed August 21st, 1916. Objections of plaintiff. The rule and return of the Commissioner need not be printed. Objections and exceptions of plaintiff, and order of court. It is agreed that the depositions shall be, by the desire of both counsel, printed in the exact words of the witnesses.

(4) Defendant's exhibits as follows: (a) Petition of the plaintiff of July 1st, 1915, in the bankruptcy case; (b) Rule of the Referee thereon; (c) Motion of Bray to dismiss; (d) Motion of Jacob Eichel to dismiss; (e) Answer of Bray; (f) Answer of Jacob Eichel.

(5) Opinion of the District Court, filed November 8th, 1916.

(6) Petition of Laura Eichel for re-trial, re-hearing and re-argument, filed November 10th, 1916.

(7) Decree of the District Court of December 6th, 1916.

(8) Transcript of the trial commencing October 16th, 1916, containing the offers of counsel and the testimony of witnesses, H. P. Camden and George N. Seaman. It is agreed that it is impracticable to reduce to narrative form, as testimony is so short.

(9) The record of the Superior Court of Vanderburg County, Indiana, in the suit of Bray vs. Laura Eichel

and Jacob Eichel, printing the following pages thereof: 1, 2, 3, 7, 8, 9 (at the end of 9 state that Exhibit "A" hereinbefore referred to is printed above), 12, 13, 14, Interrogatories 1, 2, 3 and 4 on page 17, and 5, 6 and 7 on page 18, 20. Answers to interrogatories 6 and 7 on page 21, 23 (Exhibit "A" is filed with this).

(10) Plaintiff's Exhibits Nos. 1 and 2, being Nicola Brothers account. Exhibit "B" attached to statement of claim in that case.

(11) Petition for appeal of Laura Eichel, Madison J. Bray and Philip W. Frey, and allowance thereof.

(12) Assignments of error of appellants.

(13) This stipulation and order thereon.

WM. M. HALL,
Attorney for Appellants.

WM. E. SCHOYER,
Attorney for Appellee.

December 16, 1916, the foregoing stipulation as to contents of record approved and the record directed to be printed as therein stipulated.

PER CURIAM.

Supplemental Stipulation as to Record.

FILED DECEMBER 21, 1916

It appearing that Counsel for the United States Fidelity & Guaranty Company has entered an appeal to the Circuit Court of Appeals for that Company, it is agreed that its petition for Appeal and the Assignemnts of Error filed therewith shall be added to the record in said court.

WM. M. HALL,
Counsel for Laura Eichel et al.

WM. E. SCHOYER,
Counsel for the United States Fidelity & Guaranty Company.

December ...., 1916.

Order.

AND NOW, this second day of December, 1916, the within stipulation approved.

PER CURIAM.

Certificate of Clerk as to Record.

WESTERN DISTRICT OF PENNSYLVANIA, ss.

I, J. WOOD CLARK, Clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the Record in both appeals in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

IN TESTIMONY WHEREOF, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, this.....day of.....A. D. 19..

.....*Clerk.*

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2215 (List No. 13).

LAURA EICHEL, JACOB EICHEL, MADISON J. BRAY, and PHILIP W. FREY, Appellants,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appellee.

And afterwards, to wit, on the ninth day of March, 1917, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the sixteenth day of April, 1917, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit.

No. 2214, March Term, 1917.

U. S. FIDELITY & GUARANTY CO.

vs.

LAURA EICHEL et al.

No. 2215, March Term, 1917.

LAURA EICHEL et al.

vs.

U. S. FIDELITY & GUARANTY CO.

Cross-Appeals from the District Court of the United States for the Western District of Pennsylvania, in Equity.

Before Buffington, McPherson, and Woolley, Circuit Judges.

MCPHERSON, *Circuit Judge:*

The course of this prolonged litigation is set forth in the opinion of this court disposing of a former appeal (219 Fed. 803), and in order to avoid repetition we refer to that opinion instead of attempting even to summarize now what is there said. After the

mandate went down, the district court took up the subjects that were still to be determined and entered the decree now before us.

From this the Fidelity Co. and Laura Eichel have each appealed, and the chief complaint of Mrs. Eichel is that she should have been allowed to recover from the Fidelity Co. on the basis of the face value of the claims against the Contract Co.—these having been bought at a discount—and that the decisions in this court and elsewhere restricting her to the smaller sum are wrong. After this question had been decided in the former appeal we considered it a second time on the motion for a rehearing, and considered it again 18 months later (233 Fed. 991) on a petition asking us to make an order——

"That the district court shall rehear this case, and in such rehearing permit the parties to introduce any evidence pertinent to the issues made by the pleadings so that additional evidence may be taken on any of said issues, and the district court proceed to rehear the case on the evidence already taken and in, and on any additional evidence that may be offered."

Nothing is before us now that has not already received the necessary attention, and we feel justified in standing by a decision that was deliberately made and must be accepted as final in this tribunal.

Her other subject of complaint is the allowance—$1,333.94 and interest—made by the district court on account of the claim bought from the Clydesdale Stone Co. She asserts that the allowance should have been larger, but as far as we can discover she does not specify the sum to which she contends the allowance should be increased. This however is not important, for the Fidelity Co. also complains about the same allowance asserting that the amount should be reduced to $806.17 with interest, and we think this complaint should be sustained. In the former opinion, we indicated the rule that should be followed in applying the credits for money paid by the Contract Co. to the Stone Co. and the result of following this rule is in favor of the Fidelity Co.'s contention. The amount awarded on account of this claim should therefore be reduced.

The Fidelity Co. complains also about the allowance made on account of the claims of the Pittsburgh Trolley Pole Co. and of Nicola Bros. The district court was directed to ascertain and allow the amount actually paid for these claims, and the Fidelity Co. contends now that both claims should have been rejected on the ground that the evidence is not sufficient to establish satisfactorily that Mrs. Eichel paid any amount therefor. Without discussing the evidence in detail, and conceding that it might have been more clear, we are of opinion that the point should not be sustained. Some direct evidence exists, which satisfied the court below, and we do not find ourselves prepared to say that a plain error has been committed. These allowances will therefore stand.

One other matter is left for consideration, and this requires us to turn to the bankruptcy litigation in West Virginia. The bankrupt is the Contract Co. and this corporation is the principal debtor on all the claims now owned by Mrs. Eichel. The Fidelity Co. is the surety on these claims, and of course, as the bankrupt estate is

liable in the last resort to pay all its own debts in full, if that be possible, the ultimate liability of the Fidelity Co. will only be for so much of these debts as the estate is unable to pay. The claims involved in the suit now before us are also in proof before the bankruptcy court in West Virginia, and when we decided the former appeal it was plain that in equity Mrs. Eichel ought to credit on the Pittsburgh decree whatever sums she might receive, or might have received, in the West Virginia proceeding on the same account. At that time an order had been made in the bankruptcy court awarding about 66⅔ to these claims, and we naturally supposed that this percentage was about to be paid. We therefore said at the conclusion of our opinion—"Whatever sums have been awarded by the bankruptcy court in West Virginia on account of these claims should of course be credited" &c., and this direction the district court in Pittsburgh would no doubt have followed if Mrs. Eichel had actually received the money. But since February, 1915, the date of the former decision, the situation in West Virginia has been materially changed at the instance of the Fidelity Co. itself. In June, 1915, that company presented a petition to the bankruptcy court seeking to reopen the settlement theretofore made, setting up several reasons, among them certain new subjects of inquiry, and in effect,—when the petition as a whole is considered—beginning a fresh chapter in the litigation. Under this petition proceedings have already gone on for a year and a half, and we are advised by counsel that a month or two ago the referee decided in favor of the Fidelity Co. What may be the ultimate decision we cannot know, but we are satisfied that Mrs. Eichel should no longer be compelled to await the satisfaction to which she is entitled. The surety and the principal are alike bound in the first instance to pay a creditor's claim, and the Fidelity Co. should now be compelled to meet its obligation—subject of course to its right to be subrogated to Mrs. Eichel's claim against the bankrupt estate of the principal debtor. One branch at least of this complicated adjustment of rights should if possible be brought to an end, and as far as we can we shall make the order needed to attain that object.

We therefore direct, (1) That the costs in this court on each appeal be paid by the respective appellants;

(2) That the decree below be reduced to the sum of $45,014.88, this reduction being made by striking out the sum of $2,335.46 awarded on account of the Stone Co. claim, and substituting the sum of $1,407.93, being $806.17 plus $601.76 interest from July 1, 1904, to December 6, 1916, the date of the decree below.

(3) Thus modified the decree is affirmed; but the district court is directed not to allow execution process to issue in favor of Mrs. Eichel until she file with the clerk for the benefit of the Fidelity Co. a duly executed assignment to that Company of so much of her interest and claim against the Contract Co. and its bankrupt estate as is based on the claims that furnish the items of the present decree.

Endorsed: No. 2214-15. Opinion of the Court by McPherson, J. Received and filed April 16, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2215 (List No. 13).

LAURA EICHEL et al., Appellants,

vs.

U. S. FIDELITY & GUARANTY COMPANY, Appellees.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby modified by reducing the amount thereof to $45,014.88, and as thus modified, affirmed with costs; but the district court is directed not to allow execution process to issue in favor of Mrs. Eichel until she file with the clerk for the benefit of the Fidelity Co. a duly executed assignment to that company of so much of her interest and claim against the Contract Co. and its bankrupt estate as is based on the claims that furnish the items of the present decree.

Philadelphia, April 16, 1917.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

Endorsed: No. 2215. Order Modifying and Affirming Decree. Received and filed April 16, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.

No. 2214-15, March Term, 1917.

UNITED STATES FIDELITY & GUARANTY CO.

vs.

LAURA EICHEL et al.

Cross-Appeals from the District Court for the Western District of Pennsylvania, in Equity.

And afterwards, to wit, on the thirtieth day of April, 1917, a petition for rehearing or modification of the decree of this Court was filed, whereupon the Court made the following order:

Per Curiam:

The motion to modify the decree of this Court entered on April 16, 1917, is hereby refused. But of course this refusal must be understood to be without prejudice to the right of the Fidelity Company to take such action as it may consider proper, in such court or courts as may be appropriate, in order to obtain subrogation either to the rights of Laura Eichel, or to the rights of any other person; and without prejudice also to the right of the Company to enforce by any other proceeding such rights, either against her or against any other person, as it may now possess or may acquire by the payment of the decree.

Endorsed: No. 2214. Order Refusing, etc. Petition for Rehearing, etc. Received & Filed May 12, 1917. Saunders Lewis, Jr., Clerk.

Assignments of Error.

And now, June 28th, 1917, come the defendants, Laura Eichel, and Madison J. Bray and Philip W. Frey, by their attorney, William M. Hall, and say that the decree entered in the above case on the 16th day of April, 1917, as modified on the 12th day of May, 1917, is erroneous and unjust to them:

First. Because, as appears from the record in this case, the defendant Laura Eichel was entitled to and should have been granted a decree in the sum of $66,534.20 against the plaintiff, this being the full amount of her claims sued on with interest from their respective dates to the 6th day of December, 1916, the principal of said claims aggregating, as found by the District Court, $37,584,08, and the interest from their respective dates to December 6th, 1916, aggregating $28,950.13.

Second. Because, as appears from the record in this case, the United States Fidelity & Guaranty Company was fully informed before Laura Eichel purchased these claims that it had been proposed that she do so for the purpose of carrying the claims and giving the surety time, and that it was proposed that Madison J. Bray, the trustee of the bankrupt, the Evansville Contract Company, enable her to do this by helping her, else otherwise she could not do it, and it further appears that this was consented to and approved by the United States Fidelity & Guaranty Company, through their agent and their attorney, and resting upon that agreement, the claims were purchased, and there nowhere appears in the case any testimony or documentary evidence contradicting this.

Third. Because, as appears from the record in this case, the United States Fidelity & Guaranty Company's bill of complaint contains and is founded upon the allegations of the plaintiff that Jacob Eichel, the husband of Laura Eichel, made an agreement with it, the plaintiff, by which he was to be permitted to buy these claims, this position of the plaintiff therefore being inconsistent with any denial on its part of knowledge and of consent that the claims could be bought.

Fourth. Because, as appears from the record in this case, these claims were purchased in the year 1904, and there nowhere appears in the record, nor is it a fact, that Bray was interested as part owner in these claims at that time, and it nowhere appears in the record that he became in any way interested until December, 1906, and the agreement between him and Laura Eichel by which he was then (December, 1906,) to loan her his credit to carry a loan in bank or in his own hands does not come within the rule forbidding a trustee to make profit, and it is not a correct deduction of law to hold it a profit.

Fifth. Because, as appears from the record in this case, this being a question of profits, the Court has not taken an account of profits and should have allowed, first, a reasonable attorney's fee for collection, as the claims at the time Bray became interested in them (December, 1906,) were in the hands of attorneys for collecting; second, what Bray and Laura Eichel paid out in expenses, to wit, Laura Eichel, $1,182.36, Bray $2,542.27; and third by the note and agreement of December, 1906, between Bray and Laura Eichel, Bray only got 3 per cent. interest on the amount for which he was liable as an endorser, to wit, $27,037.39, and never can get any more than that in his dealings with Laura Eichel. He gave a quid pro quo for the so-called profit, and after this lapse of time there is no profit, and at the time the agreement was made long litigation was in contemplation.

Sixth. Because, as appears from the record in this case, the Court should not have stricken out Laura Eichel's half of or —

Seventh. Because, as appears from the record in this case, there never was an application by the debtor, the Evansville Contract Company, in the Clydesade Stone Company account, and the Clydesdale Stone Company had an unquestioned right to make the application as it saw fit or as suited its convenience, and having done so to the payment of the account on the Merrill Dam job, it is not within the right of the surety to object, and the refusal to sustain the two Clydesdale Stone Company cases at Nos. 24 and 25 November Term, 1907, aggregating $4,851.17, was erroneous. The denial of this claim strikes down the absolute right of the Clydesdale Stone Company to make the application.

Eighth. Because, as appears from the record in this case, Laura Eichel paid to the Clydesdale Stone Company $3,606.30. The court has allowed her but $806.17. If this is a question of profit, the rule should be applied so as to reimburse her for what she has paid. Under the decree, the court, instead of shaping the decree so as to prevent any profit to either Bray or Laura Eichel, which is at the outside the extent of the opinion of the Court of Appeals, has brought Laura Eichel out a loser in the transaction to the extent of $2,800.13.

Ninth. Because, as appears from the record in this case, at the instance of the plaintiff, there was awarded by the United States District Court for the Northern District of West Virginia, in the bankruptcy of the Evansville Contract Company, in the distribution of the funds of that estate, on the Clydesdale Stone Company claim,

the total amount thereof, $6,185.35, as a preferred or lien claim, and it is not now proper for the plaintiff to repudiate that in this case. That amount was awarded for its benefit on its position that it was bound to pay that much money.

Tenth. Because, as appears from the record in this case, it was error to hold and decide "that Bray, Frey, and the Eichels were parties to a plan to buy the claims at a discount in order that Bray might share in the profits of the transaction; and we agree also that a court of equity cannot sanction such conduct. The court below took a different view, holding that the purchase at a discount was lawful, and that the Surety Company was liable to Laura Eichel for the face value of the claims instead of for the sum actually paid. In this respect the decree was erroneous and must be corrected."

Eleventh. Because, as appears in the record of this case, it was error not to give effect to the finding of fact of the District Court, which was not controverted in any way by any testimony or evidence, but was found upon undisputed evidence:

"1. The plaintiff was represented in negotations with the Trustees and others after the institution of said bankruptcy proceedings by its Chief Engineer, Charles F. Wood, who, according to his own testimony, was charged with the duties of 'investigating the details of the contract; completing the work when necessary; adjusting claims in connection with the work and in general doing those things which will close the liability and secure the release of the company under its bonds.

"2. At or about that time Jacob Eichel informed Wood of an intention to buy the claims for labor and materials if it could be arranged. He consulted with the defendant, Frey, who was Laura Eichel's attorney.

"3. There was no concealment, deception or fraud on the part of Bray, Frey or Laura Eichel. Before Bray or Frey had purchased any claim for Mrs. Eichel, and in the month of May, 1904, at a meeting of the creditors of the bankrupt, Bray stated to those present that he 'was helping Mrs. Eichel to buy these claims.' There was present a reputable attorney who had previously been looking after the interests of the surety and who subsequently also acted for the surety. While it does not clearly appear that he was at the time in such employ, yet Bray would have been justified in believing that the relationship was in force. No one at the meeting raised an objection. Some gave him encouragement. The presumption was that no one would buy a large number of claims against the bankrupt at their face, coupled with the fact above found that the Trustees and the Surety believed that the creditors would be paid in full, justifies the conclusion that the creditors and the plaintiff in this bill knew that Laura Eichel was buying claims at a price less than their face and that Bray and Frey were helping her to do so."

Twelfth. Because, as appears from the record in this case, any profit of Bray, Trustee, should go to the estate of the Evansville Contract Company in Bankruptcy for distribution to its creditors and not to this surety, the plaintiff.

Thirteenth. Because, as appears from the record in this case, in awarding the costs in the two Clydesdale Stone Company cases, $27. to be paid by the defendant.

Fourteenth. In awarding the costs of the Court of Appeals case to be paid by the defendant.

Fifteenth. Because, as appears from the record in this case, the Court of Appeals reduced the decree of the District Court to $45,-014.88, this reduction being made by striking out the sum of $2,335.46, awarded on account of the Stone Company claim and substituting the sum of $1,407.93, being $806.17 plus interest $601.75 from July 1st, 1904, to December 6th, 1916.

For these and other errors apparent on the record, the appellants pray that the final decree of said Circuit Court of Appeals may be reversed, and a decree entered in favor of said Laura Eichel for the full amount of her claims, with interest and costs.

LAURA EICHEL,
MADISON J. BRAY,
PHILIP W. FREY,
By WM. M. HALL,
Their Attorney.

Endorsed: No. 2215. Assignments of Error. Received and filed June 30, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.
March Term, 1917.

No. 2215.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation of the State of Maryland, Appellee-Appellant,

and

LAURA EICHEL, JACOB EICHEL, MADISON J. BRAY, and PHILIP W. FREY, Appellants-Appellees.

Know all men by these presents, that we, Laura Eichel, Madison J. Bray, and Philip W. Frey, as principals, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, as surety, acknowledge ourselves to be jointly and severally held and firmly bound unto the United States Fidelity & Guaranty Company, a corporation, in the sum of one thousand ($1,000) dollars, for the payment of which we jointly and severally bind ourselves, and each of us, and each of our heirs, executors, administrators and successors, firmly by these presents.

Witness the signatures and seals of the parties hereto, the corporate seal being duly affixed by lawful authority duly given, this 28th day of June, 1917.

The Condition of this obligation is such that, whereas, in the above entitled certain case in equity, upon appeal to the said Cir-

cuit Court of Appeals for the Third Circuit, wherein the United States Fidelity & Guaranty Company was appellee, and said Laura Eichel, Madison J. Bray and Philip W. Frey were appellants, a final decree was made and rendered against the said appellants on the 16th day of April, 1917, as modified on the 12th day of May, 1917, and whereas the said Laura Eichel, Madison J. Bray and Philip W. Frey have taken an appeal to the Supreme Court of the United States from said final order and decree:

Now Therefore, if the above named Laura Eichel, Madison J. Bray and Philip W. Frey shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then this obligation to be void; otherwise it shall remain in full force and virtue.

LAURA EICHEL, [SEAL.]
MADISON J. BRAY, [SEAL.]
PHILIP W. FREY, [SEAL.]
By their Attorney WM. M. HALL. [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, [SEAL OF COMPANY.]
By N. L. P. SHIMER,
Agent and Attorney-in-Fact.

Witness:
—— ——.

June 29, 1917.—The above bond approved.
(Signed) JOS. BUFFINGTON, *Judge.*

Endorsed: No. 2215. Bond on Appeal to Supreme Court. Received and filed June 30, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2215.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation of the State of Maryland, Appellee-Appellant,

and

LAURA EICHEL, JACOB EICHEL, MADISON J. BRAY and PHILIP W. FREY, Appellants-Appellees.

Petition of Laura Eichel, Madison J. Bray and Philip W. Frey, Appellants, Appellees for an Appeal to the Supreme Court of the United States.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of Laura Eichel, Madison J. Bray and Philip W. Frey respectfully shows:

1. That in the above entitled case there was rendered and filed a final decree in the United States Circuit Court of Appeals for the Third Circuit, on the 16th of April, 1917, modifying the decree of the United States District Court for the Western District of Pennsylvania; that said decree of the District Court was entered on the 6th day of December, 1916, in favor of your petitioner Laura Eichel in the sum of $45,942.41, with interest from December 6th, 1916, against the United States Fidelity & Guaranty Company, a corporation of the State of Maryland, together with costs in the sum of $218.04, in certain actions, Nos. 42 to 57, both inclusive, November Term, 1907, on the law side of said court, and $27 in Nos. 24 and 25 in the same term, said Laura Eichel to allow a credit of $790.93, costs awarded her in said Circuit Court of Appeals, with interest from the 23d of December, 1915, and the said United States Fidelity & Guaranty Company to pay Laura Eichel the costs of the case in which the decree was made. The decree of the Circuit Court of Appeals reduced the decree of the District Court to the sum of $45,004.88, and thus modified, affirmed the decree and directed the District Court not to allow execution process to issue in favor of Laura Eichel until she filed an assignment unto the United States Fidelity & Guaranty Company of so much of her interest and claims against the Evansville Contract Company arising on certain suretyship of the United States Fidelity & Guaranty company for said Contract Company. Subsequently the United States Fidelity & Guaranty Company filed in the Circuit Court of appeals a petition for a modification of the decree so as to require said Madison J. Bray to file an assignment of his interest in said claim, but on the 12th day of May, 1917, the Circuit Court of Appeals, by its order, refused to modify its decree, without prejudice to the rights of the United States Fidelity & Guaranty Company to take such action as it may consider proper in such court or courts as may be appropriate in order to obtain subrogation, and by the decree aforesaid of the said Circuit Court of Appeals for the Third Circuit there is manifest error and your petitioners have been prejudiced and aggrieved.

2. That the matter in controversy in this case exceeds the sum of ten thousand ($10,000) dollars, exclusive of costs and interest, and that this is not a case in which the decision of the Circuit Court of Appeals is made final, and your petitioners have a right of review by the Supreme Court of the United States in an appeal.

3. The said case originated in eighteen separate actions at law, brought by Laura Eichel as use plaintiff against the said United States Fidelity & Guaranty Company in the Circuit Court of the United States for the Western District of Pennsylvania at Pittsburgh, the said Laura Eichel claiming in each and every one of said suits the right to recover against the said United States Fidelity & Guaranty Company by reason of and under the terms of a bond given by the Evansville Contract Company as principal and said United States Fidelity & Guaranty Company as surety to the United States of America in and about the work and construction by the Evansville Contract Company of river improvement on various

rivers within the United States, as provided by the Act of Congress of the 13th of August, 1894, 28 Statutes at Large, 278, chapter 280, all of said suits being brought in the name of the United States for use of the respective parties therein named, who had furnished work or material on said river work, and subsequently, either directly or by an intermediate assignment to another person, assigned the same to said Laura Eichel, so that she claimed in the right of the United States of America, the right to recover against the said United States Fidelity & Guaranty Company certain sums of money, under the said Act of Congress. The said United States Fidelity & Guaranty Company having been duly served with the process of the said Circuit Court at Pittsburgh appeared, pleaded to each and every one of said suits, and the same were duly put at issue and were for trial in the said Circuit (now District) Court at Pittsburgh; whereupon, on the 28th day of October, 1912, the said United States Fidelity & Guaranty Company filed its bill in equity in the District Court of the United States for the Western District of Pennsylvania at Pittsburgh, to which, under the law in such case made and provided, said eighteen separate suits had been transferred and were then pending for trial in said Court. This bill was filed on the equity side of said Court and set up alleged equitable defenses to said claims, and by reason of said defenses and on the plea of multiplicity of suits, prayed that the said District Court would determine all matters in controversy between the parties, the allegation being made by the United States Fidelity & Guaranty Company in its said bill that said Bray, as Trustee of the Evansville Contract Company in bankruptcy, and Frey had an interest in the claims so sued upon by Laura Eichel; and also that the claims had been bought at a discount on an arrangement by which Bray was to share in that discount. To this bill answers were filed by your petitioners, alleging that the claims were bought by Laura Eichel with the full knowledge and consent and for the benefit of the United States Fidelity & Guaranty Company; that Bray, the trustee in bankruptcy of the Evansville Contract Company, had assisted Laura Eichel in buying these claims, by endorsing her note in the bank, and that the United States Fidelity & Guaranty Company had full notice of this, consented to it, and profited by it by reason of gaining time on the claims; that Bray had no profit in the transaction whatsoever until upwards of two years after its inception when he was given a share of the so-called profit or discount for helping Laura Eichel carry the claims, which long since should have been paid by the United States Fidelity & Guaranty Company, the surety. The case then proceeded to trial in the said District Court, where on December 13th, 1913, a decree was entered in favor of your petitioner Laura Eichel, for all her claims and against the United States Fidelity & Guaranty Company, in the sum of fifty-nine thousand seven hundred sixty-nine and 08/100 ($59,769.08) dollars, and from this decree an appeal was taken by the United States Fidelity & Guaranty Company to the said Circuit Court of Appeals. The case was heard in the Circuit Court of Appeals on the 9th day of October, 1914, and on the 3d day of

February, 1915, the Circuit Court of Appeals reversed the decree of the District Court, with the costs of appeal directing the District Court to enter a decree in accordance with the opinion of the Court of Appeals, which held that "Bray, Frey and the Eichels were party to a plan to buy the claims at a discount in order that Bray might share in the profits of the transaction, and we agree also that a court of equity cannot sanction such conduct. The court below took a different view, holding that the purchase at a discount was lawful and that the surety company was liable to Laura Eichel for the face value of the claims instead of for the sum actually paid. In this respect the decree was erroneous and must be corrected." In addition, the Court of Appeals directed the District Court to ascertain the facts about two of the claims as to what had been paid for them, and the subjects of interest and costs were left to the District Court, and to the District Court was also left the modification of a certain claim of the Clydesdale Stone Company purchased by Laura Eichel, involving the question of the application of payment. The opinion of the Court of Appeals is found in 219 Fed. 803.

On the 25th of February, 1915, an appeal was allowed by Judge Buffington to the Supreme Court of the United States on the Petition of Laura Eichel, Madison J. Bray and P. W. Frey, and this appeal was dismissed by the Supreme Court on November 8th, 1915, for want of jurisdiction, on the ground that it was not a final decree (239 U. S. 629). The case then went back to the Court of Appeals and the mandate issued to the District Court, and that Court proceeded to hear the case as restricted by the Court of Appeals, entering its decree for $45,942.41, on the 6th of December, 1916, to which decree an appeal was taken by your petitioners to the Circuit Court of Appeals, alleging errors of the District Court that it was error not to allow Laura Eichel the full amount of her claims. The Circuit Court of Appeals, by its decision from which appeal is now sought, refused to allow her position, and further reduced the claims of the Clydesdale Stone Company, now for use of Laura Eichel, by the further sum of $1,407.93, Laura Eichel claiming through the Clydesdale Stone Company three separate claims: (*a*) one of $1,333.94, which was allowed her, but scaled down to $806.17 by proportionating the discount; (*b*) one of $3,445.33, which was not allowed her, and (*c*) one of $1,485.84, which was not allowed her.

That the errors by which your petitioners have been aggrieved are the refusal of the District Court and the Circuit Court of Appeals:

(*a*) To allow and award to Laura Eichel the full amount of her claims so purchased by her from the claimants against the Evansville Contract Company, on which claims the United States Fidelity & Guaranty Company was surety upon its bond given to the United States of America.

(*b*) That as to the sum of $8,626.43 of the principal of said total claims, being the so-called discount or profit thereon made in the purchase thereof, your petitioner M. J. Bray claiming the right

to receive from Laura Eichel (not the United States Fidelity & Guaranty Company) a half interest in consideration of his lending Laura Eichel money to carry these claims two and a half years after they were purchased, to allow Bray to recover this.

(*c*) To allow Laura Eichel her half of said so-called discount or profit.

(*d*) To allow, in ascertaining this profit, expenses of the collection.

(*e*) To allow your petitioner Laura Eichel, or her assignor, Clydesdale Stone Company, to appropriate payments made by the Evansville Contract Company, the debtor, to later purchases of material in the absence of any appropriation by the debtor.

4. That each and every one of said eighteen separate cases brought in the name of the United States of America for use of said Laura Eichel was properly brought in the United States Circuit Court at Pittsburgh, without regard to the citizenship of the parties thereto, because under the decisions of the Supreme Court of the United States, the United States of America was the real party thereto, so as to sustain the original jurisdiction of said Circuit Court, and all of said suits were based upon the statutes of the United States, to wit, the Judiciary Acts of 1887 and 1888, and other Acts made in such case made and provided, and said Act of Congress of the 13th of August, 1894, relating to bonds given by public contractors, and said bill in equity seeking a trial of the controversies arising in said separate suits did not in any way depend upon diverse citizenship, and the jurisdiction of said District Court to entertain said bill arose entirely from the fact that said eighteen separate suits were pending in said District Court.

5. That one of the matters in controversy, as raised by said bill in equity and passed upon by the District Court and the Circuit Court of Appeals in this case, was the effect to be given to certain rulings and decrees of the District Court of the United States for the Northern District of West Virginia, in the matter of the bankruptcy of the Evansville Contract Company, the contractor which had given to the United States of America all of the bonds under which the said Laura Eichel, said use plaintiff, claimed to recover in her said eighteen separate suits, it being alleged in said bill in equity that by reason of the proof of claims being filed on all of said Laura Eichel's claims in the bankruptcy proceedings of the Evansville Contract Company, the said District Court of the United States for the Northern District of West Virginia had exclusive jurisdiction to determine the validity and amount of her said claims, and this branch of the case arose under and was based upon statutes of the United States known as the Bankruptcy Laws, providing for the settlement and distribution of estates of bankrupts and of controversies arising therein.

6. The Supreme Court of the United States has jurisdiction by appeal of the matters decided by the Circuit Court of Appeals for the Third Circuit, and the jurisdiction below did not depend upon diverse citizenship.

7. Your petitioners herewith file an assignment of errors from

the decree of the said Circuit Court of Appeals for the Third Circuit, and tenders any bond that your Honors may require.

LAURA EICHEL,
MADISON J. BRAY,
PHILIP W. FREY,
By Their Attorney, WM. M. HALL.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

William M. Hall, attorney for the above named appellants, being duly sworn, says he has full knowledge of the facts set forth therein, and that the said statement of facts is correct and true, as he verily believes.

(Signed) WM. M. HALL.

Sworn to and subscribed before me this 28th day of June, 1917.

B. D. GAMBLE,
Deputy Clerk, U. S. Dist. Court.

Endorsed: No. 2215. Petition of Laura Eichel, Madison J. Bray and Philip W. Frey for Appeal to the Supreme Court. Received and filed June 30, 1917. Saunders Lewis, Jr., Clerk.

Order Allowing Appeal.

On the 29th day of June, 1917, Laura Eichel, Madison J. Bray and Philip W. Frey filed their petition in this Court, accompanied by an assignment of errors, praying an appeal from the final decree and decision rendered in the above case on the 16th day of April, 1917, as modified on the 12th day of May, 1917, by the United States Circuit of Appeals for the Third Circuit, at the same term at which said decree and decision were rendered, and after consideration of said petition and assignment of errors, it is ordered that an appeal be allowed as prayed for, and a bond with good and sufficient surety tendered by the appellants with the condition required by law, in the sum of one thousand ($1,000) dollars, is hereby approved, to operate as a supersedeas, and it is ordered that the Clerk do certify and transmit to the Supreme Court of the United States a record of the case and of the proceedings, orders and decrees therein.

(Signed) JOS. BUFFINGTON,
U. S. Circuit Judge.

Endorsed: No. 2215. Order Allowing Appeal to Supreme Court. Received and filed June 30, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2215.

LAURA EICHEL, MADISON J. BRAY, and PHILIP W. FREY, Appellants,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appellee.

Appeal to the Supreme Court of the United States from the Decree of the United States Circuit Court of Appeals for the Third Circuit.

To Saunders Lewis, Jr., Esq., Clerk of the United States Circuit Court of Appeals for the Third Circuit:

In compliance with Rule 8 of the Supreme Court of the United States, the appellants hereby indicate the portions of the record to be incorporated into the transcript of the record on this appeal.

(1) The first record in this case, as printed at No. 1850 October Term, 1914, and before the Court of Appeals on the first hearing, upon which record the Court of Appeals, on the 3d day of February, 1915, entered a decree, together with the record of the opinion and decree of the Court of Appeals and the proceedings for appeal from said decree of the Court of Appeals by Laura Eichel, Madison J. Bray and Philip W. Frey, being their petition for appeal, assignments of error, and order allowing the appeal, with the bond, as transmitted by you to the Supreme Court, and by the Clerk of that Court printed as an addendum to said first record in the Court of Appeals.

(2) The second record of the appeal in the Circuit Court of Appeals in this case, as printed at No. 2215 March Term, 1917, and at No. 2214 said term, the record being the same in both of said numbers.

(3) A transcript of the following portions of the record in this case in the Circuit Court of Appeals which are not included in said printed record:

(*a*) The opinion of the Court.

(*b*) The decree.

(*c*) The order of the Court upon the petition of the United States Fidelity & Guaranty Company for reargument and modification, which order was entered May 12th, 1917.

(*d*) Petition of Laura Eichel, Madison J. Bray and Philip W. Frey for appeal to the Supreme Court of the United States, with assignments of error and bond, and order thereon.

(Signed) WM. M. HALL,
Attorney for Laura Eichel, Madison J. Bray and Philip W. Frey, Appellants.

July 3, 1917.—I, William E. Schoyer, attorney for the Appellee, United States Fidelity & Guaranty Company, do hereby accept service of a copy of the above præcipe, and I agree that the portions of the record above set out shall constitute the transcript of the record on appeal to the Supreme Court.

(Signed) WM. E. SCHOYER,
Attorney for United States Fidelity & Guaranty Company, Appellee.

Endorsed: No. 2215. Præcipe of the Appellants indicating the portions of the record to be printed in the Transcript on appeal to the Supreme Court of the United States, acceptance of service and agreement of Appellee's attorney. Received and Filed July 5, 1917. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Laura Eichel, Jacob Eichel, Madison J. Bray, and Philip W. Frey, Appellants, vs. U. S. Fidelity & Guaranty Company, Appellee, No. 2215 and also of the Record and proceedings in this court in the case between the same parties No. 1850 as formerly prepared for the Supreme Court of the United States on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this ninth day of July in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

To the U. S. Fidelity & Guaranty Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein Laura Eichel, Jacob Eichel, Madison J. Bray and Philip W. Frey are Appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said petition for appeal mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this sixth day of July, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

JOHN B. McPHERSON,
Circuit Judge.

July 7th 1917.—Service of the within citation accepted.

U. S. FIDELITY & GUARANTY CO.,
By WM. E. SCHOYER, *Att'y.*

Supreme Court of the United States

No. 571 OCTOBER TERM, 1917.

LAURA EICHEL, MADISON J. BRAY and PHILIP W. FREY, APPELLANTS,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION OF APPELLANTS TO ADVANCE CASE FOR HEARING

WM. M. HALL,
2128 Oliver Bldg., Pittsburgh, Pa.,
Attorney for Appellants.

Supreme Court of the United States

OCTOBER TERM 1917.

No. 571

LAURA EICHEL, MADISON J. BRAY and PHILIP W. FREY.
Appellants

vs:

UNITED STATES FIDELITY & GUARANTY COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION OF LAURA EICHEL, MADISON J. BRAY AND PHILIP W FREY, APPELLANTS, TO ADVANCE CASE FOR HEARING.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

1. That the citation in this case has been served on the appellee, this appeal has been docketed, and the transcript of the record printed.

2. A chronological statement of the history of the substance of this litigation is as follows:

1904. February 27. Evansville Contract Company adjudicated bankrupt in Parkersburg, West Virginia, the appellee being its surety under Act of Congress of August 13, 1894, on a

number of bonds on river work for the United States.

On these contracts all the material claims, now owned by the appellant, Laura Eichel, were due and unpaid. They aggregated at face $37,497.79. (See p. 121 of the first transcript of record and p. 151 of the second transcript of the record as to Nicola Brothers' claim and Pittsburgh Trolley Pole Company claim.)

March 15. Bray, one of the appellants, Dotson and Heine elected its Trustees. In the year 1904 the Trustees were authorized to complete the contracts of the bankrupt and continue the business, appellee given $75,000 bond by certain banks, against any claims. In this year Laura Eichel bought all the above stated claims at a discount of approximately $9,000, expending considerable money and time in so doing. Bray assisted her in doing this by endorsing for her, and Frey, who was one of the attorneys for the Trustees, was also her attorney and took the assignment of claims first in his name, making arrangement with the City National Bank to advance the money and hold the claims as collateral. The case of Laura Eichel, Bray and Frey in the District Court, where the case was tried, was that this had been with the full knowledge of the trustees

of the bankrupt, its creditors in general meeting, of the Referee in charge of the case, and of the surety through Wood, its manager, and Mr. Ambler, its attorney, this being done for the purpose of preventing the immediate pushing of the claims and the consequent payment by the surety. The claim of the surety company was that the purchase was secretly made by Bray (not Eichel) and that Bray could not profit, it appearing that in December, 1906, Laura Eichel had agreed that Bray should have half the profits in consideration of his reducing the rate of interest and lifting from the banks the claim upon which they were carried.

1905. December 19. The Trustees filed their account, showing the substantial settlement of the estate and the balance for distribution of about $26,000, sufficient only to pay approximately 50 per cent. of Laura Eichel's claims.

1907. March. Laura Eichel brought suit on all her claims in the State court at Pittsburgh against the surety company.

June and August The Supreme Court having decided in the case of U. S. F. & G. Co. vs. U. S., 204 U. S., p. 349, that the United States Court had jurisdiction in such cases no matter what the amount, because the United States is the real party, Laura

Eichel dropped her suits in the State Court and proceeded in the United States Court at Pittsburgh on the law side in eighteen different suits, each suit being brought naming the United States of America for the use of the respective claimants and then for the use of Laura Eichel, assignee.

1908. January 18. The surety company started in the Circuit Court of the United States at Parkersburg, West Virginia, an injunction proceeding to enjoin the suits at Pittsburgh, take plenary jurisdiction, and to take away from the court of bankruptcy the distribution of the funds of the estate. The Circuit Court granted the injunction and the other prayers.

February 12. Laura Eichel and Bray appealed from this.

1909. June 3. The Circuit Court of Appeals reversed the decree of the Circuit Court and dissolved the injunction, and an appeal was taken by the surety company to the Supreme Court of the United States.

1912. May 27. Motion to dismiss and affirm having been refused, the Supreme Court affirmed the Circuit Court. (See 225 U. S. 205.)

During this litigation the trial court at Pittsburgh had refused to proceed with the cases on the

ground that comity at least required this.

1912. October 28. On Laura Eichel pressing for trials at Pittsburgh, the surety company filed a bill in equity in the same court, which bill is the basis of the suit now before the court in this appeal. In this bill, (pp. 2 to 29 in the first record), the surety company set up the same position which it had been taking, as before stated above, and in its fifth prayer (on p. 28 of the first record) prayed:

> "FIFTH. That your Honorable Court will take full and complete jurisdiction of the matters in controversy between your orator and the said Laura Eichel, and the other defendants, and determine what, if any, amounts your orator is liable to pay because of its being surety on the said bonds, so that all the controversies between the parties thereto may be determined in this one proceeding."

The grounds of the bill were fraud and the prevention of the multiplicity of suits. There had been no distribution of the $26,000 funds of the estate at Parkersburg in all these years since 1905, owing to the position taken by the surety company. Laura Eichel answered, set out the delay that had been caused her; that she had a perfectly

good case; that she would yield nothing on her claims on the law side of the court; that the court hear her claims as fully as they would be heard on the law side of the court.

1913. January 4. The Referee at Parkersburg distributed the funds of the estate of the bankrupt, awarding to Laura Eichel's claims 66-2/3 per cent, after striking therefrom about $9,000, which was the so-called profit or discount, this award being considerably less than 50 per cent. of her claims with interest. The position taken by Laura Eichel before the Referee was that the place to adjudicate her claims was at Pittsburgh and not before him, because in the first place nobody was fighting the allowance of her claims in full except the surety company, and that no decision of the Referee could in any way give her what the surety company admitted should be given, and that the surety company was acting in bad faith and had already filed its bill in equity in Pittsburgh, asking the court there to fully adjudicate all matters.

NOTICE THAT CONTEST AT PARKERSBURG WAS ONLY BY THE SURETY COMPANY.

1913. December 4-10. The District Court at Parkersburg, on appeal from the Referee's

decision, sustained his decision in an opinion and decree which, if of any force except as to distribution, adjudicated in a plenary way all the claims of Laura Eichel against the surety company.

There was also before the Referee and the District Court in this case a claim of unsecured creditors that funds were not impressed with the prior claims of Laura Eichel, having been derived from contracts where the surety company was not surety.

This decision of the District Court was taken to the Court of Appeals for the Fourth Circuit, there affirmed, and subsequently an appeal therefrom was dismissed by the Supreme Court of the United States on the ground that no findings of fact had been made by the Circuit Court of Appeals and there was no jurisdiction in the Supreme Court to consider. Mem. Decs. 239 U. S. 628.

1913. December 13. The District Court at Pittsburgh having tried the case, which is now at the bar of this court, in the month of March previous, made its findings and decree in favor of Laura Eichel for the full amount of her claims, $59,769.08. The first record filed in this court contains everything in this case up to that time. There was substantially no

testimony offered by the surety company. The opinion of Judge Orr will be found on pp. 407 to 414 of the first record.

1914. February 11. The surety company appealed to the Circuit Court of Appeals for the Third Circuit.

1915. February 3. The Circuit Court of Appeals, in an opinion by Judge McPherson, reversed the District Court, sending the case back, directing the court to strike out the so-called profits in the claims. The opinion of Judge McPherson will be found on pp. 513 to 521 of the first record. It will be noticed that his opinion turns on the findings and opinions of the referee and the court at Parkersburg, and as we allege, does not give effect to the findings of the court at Pittsburgh, and in substance we respectfully say denies to Laura Eichel her right to be heard on the case at Pittsburgh.

February 25. Laura Eichel, Bray and Frey appealed to the Supreme Court of the United States from the decision of the Court of Appeals. The case is docketed and the first record printed.

July 1. There having been no payment of the fund at Parkersburg, the surety company presented to the District

Court its petition, which will be found on pp. 43 to 77 of the second record, in substance setting up the same controversy and claim which it had set up before that court in the year 1907, which controversy went through the Court of Appeals and the Supreme Court, as above stated. The petition made certain banks in Indiana, who were indemnitors of the Surety Company, parties; alleged that Jacob Eichel, the husband of Laura Eichel, had confederated with Bray on certain claims in the Court of Claims, by which, in 1908, fraud had been committed upon the estate of the bankrupt by allowing the purchase by Jacob Eichel of certain claims against the United States, and that $16,835.41 expenses and counsel fees of the surety company had been incurred, and that in substance no money should ever be paid to Laura Eichel or Bray, but all of the funds used to indemnify the surety company, which claimed it had a right of indemnification to the amount of $68,951.88. (See prayers of the petition, pp. 68 to 72 of second record, and particularly the exhibit on p. 77.) Rule was granted by the referee on this petition, certain hearings were held, no decision was made until after the trial of the case at bar at Pittsburgh, and after the record in that

case was made up for the Court of Appeals, so that it is impossible to put that in the record, but as a matter of fact, the record shows that no decision was made up to the time of the trial at Pittsburgh. There has been a decision since, fully in favor of the surety company, directing the parties, including Laura Eichel, to answer, and that the case be tried, and there the case stands today.

1915. November 8. The Supreme Court dismissed the appeal from Third Circuit for want of jurisdiction on the ground that the appeal was not final. (See Memorandum Decision, 239 U. S. 629.)

1916. December 6. The case, having come back to the District Court for hearing, was heard and a decree entered, following the decision of the Court of Appeals, awarding Laura Eichel $45,942.41, her first award having been reduced by two items: (a) The so-called profit or discount; (b) The total amount of certain claims known as the Clydesdale Stone Company claims in the amount of approximately $5,000, on the ground that application of payments precluded her recovery.

December 8. Laura Eichel, Bray and Frey appealed to the Circuit Court of Ap-

peals from the decision of the District Court, raising all of the points for a full hearing so that there may be a final decision in the Court of Appeals.

1917. April 16. The Court of Appeals does not change its rulings and leaves the decision of the District Court as made, except in the reduction of a small sum on the Clydesdale Stone Company case. (See pp. 174 to 177 second record.)

June 30. Appellants appeal to the Supreme Court of the United States.

It will be observed that the substance of this litigation is the so-called profit or discount claimed by Laura Eichel, and by her agreement with Bray, one-half would now go to him. This involves the sum of about $9,000, with interest for thirteen years. This has been the subject matter of the litigation since it was started at Pittsburgh in 1907. Your petitioners are not sufficiently advised, and therefore cannot advisedly allege that the merits of this case have ever been adjudicated by the Supreme Court. The litigation has been twice before the Supreme Court; first, on the appeal from the Fourth Circuit, where the Supreme Court decided that the proceeding on the cases at Pittsburgh should not be enjoined and that the Circuit Court at Parkersburg could not take away from the District Court the distribution of the fund in the bankrupt's estate. The second time the case was heard was on appeal from the Third Circuit and was dismissed for want of jurisdiction, there being no final appeal. Your petitioners therefore cannot advisedly pray the court to advance this case under the 26th Rule as one upon which there has been an adjudication upon the merits. It may be

that the Court would so consider as fairly within the purview of the Rule the appeal from the Fourth Circuit. For other reasons for this application to advance, your petitioners offer the following:

FIRST. OUR CAUSE IS JUST.

THE CASE AS MADE OUT BEFORE JUDGE ORR IN THE DISTRICT COURT AT PITTSBURGH FOR LAURA EICHEL SHOWS BEYOND CAVIL AND WITHOUT ANY CONTRADICTING TESTIMONY OR EVIDENCE BY THE SURETY COMPANY THAT IT, THROUGH ITS ATTORNEY AND AGENT, FULLY AGREED THAT LAURA EICHEL SHOULD BUY THESE CLAIMS AT A DISCOUNT, AND THIS FOR THE BENEFIT OF THE SURETY COMPANY. THE VERY BILL, WHICH IS THE FOUNDATION OF THIS CASE (See p. 8 of the first record) CONTAINS A STATEMENT BY THE SURETY COMPANY THAT THEY UNDERSTOOD IT WAS TO BE *JACOB* EICHEL WHO WAS TO BUY THE CLAIMS.

IT IS EARNESTLY URGED THAT THE OPINION OF THE COURT OF APPEALS PASSES OVER THIS FACT. FURTHER, THE DISTRICT COURT AT PARKERSBURG HAD NO JURISDICTION TO HEAR AS IT DID IN A PLENARY WAY THIS DISPUTED POINT. LAURA EICHEL WAS NOT COMPELLED TO SUBMIT HER CASE TO THAT COURT; SHE DID NOT ASK THAT COURT TO AWARD HER ANY MONEY IN DISPUTE; THE SURETY COMPANY FOUGHT ITSELF! SHE DID NOT SUBMIT IT, AND THE FINDINGS OF THAT COURT ON THAT MATTER WERE WITHOUT A HEARING. FURTHERMORE, THERE IS NO REASON IN EQUITY AND GOOD CONSCIENCE WHY BRAY COULD NOT RECEIVE FAIR COMPENSATION

FOR HIS LIFTING THE LOAN AND CARRYING IT FOR LAURA EICHEL. IT IS BEYOND CAVIL THAT THE SURETY COMPANY ENCOURAGED HIM IN DOING THIS AND AGREED TO IT AND COMMENDED HIM FOR IT. IT IS ALSO BEYOND CAVIL THAT THE REFEREE IN CHARGE OF THE CASE AND EVERY CREDITOR WHO PARTICIPATED IN THE CASE KNEW ALL ABOUT THESE MATTERS AND THAT ALL THE TRUSTEES KNEW, AND IT IS ALSO INDISPUTABLE THAT BRAY NEVER HAD ANY COMPENSATION AGREED TO OR SUGGESTED UNTIL OVER TWO YEARS AFTER THE CLAIMS WERE PURCHASED.

SECOND. That as to Bray, said decision is likewise in error, and further stamps him as a dishonest trustee.

THIRD. That as to Frey, he is by the said decision found to be, as attorney for the trustees, a participant in the same transaction.

FOURTH. That the position taken by the appellants in this case when the suits were brought at Pittsburgh, which position they have taken ever since, was that in the suits at Pittsburgh there was plenary jurisdiction on the part of the court there to adjudicate the matters in controversy, and there was no plenary jurisdiction, or jurisdiction of any kind, to adjudicate such matters in the court of bankruptcy at Parkersburg; that the attempt on the part of the surety company to draw to the bankruptcy court at Parkersburg an adjudication was only for the purpose of delay; that no one was fighting the claims, and that every dollar to be distributed was to go in relief of the surety, unless the general creditors had some merit in their claims that there was no lien or preference, and that the net result of this enjoining litigation, covering the time when the bill was filed at Parkersburg on the 18th of January, 1908, until the 28th of Octo-

ber, 1912, when substantially a similar bill was filed in the court at Pittsburgh, was delay of Laura Eichel's just claims by the surety company, this delay covering a period of very nearly five years.

FIFTH. That the proceedings at Parkersburg in the estate of the bankrupt started on the first of July, 1915, by the surety company, hereinbefore referred to, amounted to another attempt on the part of the surety company to tie up the litigation in this case and not only to prevent a distribution of the fund at Parkersburg, but to prevent Laura Eichel from ever receiving a dollar on any of her claims, and it is impossible to foresee how adjudication upon this proceeding by the court at Parkersburg will affect the status of Laura Eichel, notwithstanding the decree of the Court of Appeals for the Third Circuit, and it appears that for about nine years, namely, from the early part of 1906, the substantial rights of Laura Eichel and Bray have been involved in a difference of view held by the courts at Pittsburgh and Parkersburg as to their respective provinces and duties, and it does not yet appear that these matters are determined, and therefore a very unusual situation exists in the case.

SIXTH. The appellant, Laura Eichel, is an aged woman, and a very considerable liability in her estate has existed for thirteen years by reason of her purchase of these claims, which, she earnestly urges, was done largely for the purpose of aiding the surety company in preventing the immediate pushing of the claims, and she was induced to go into it by her husband, Jacob Eichel, who had been the manager of the bankrupt, Bray, the Trustee, and Frey, the attorney, who acted in the best of faith, holding out to her the idea that the claims would be soon paid and that it would be worth her while to attempt to make some profit, an idea which has been found to be illusory. Bray, the trustee, is an aged man, being considerably upward of seventy years, and if he is right in his contention, he has been unjustly held to be guilty of a

wrong in his office as trustee, and he should have a speedy decision, as should also Frey, the attorney.

SEVENTH. This is a peculiar case, and the decision of the Court of Appeals is not made final by the Acts of Congress, the jurisdiction of the United States Court at Pittsburgh obtained not by reason of diverse citizenship, or upon any other matter except that the United States was a party, (U. S. F. & G. Co. vs. U. S., 204, U. S. 349; HENNINGSEN vs. U. S. F. & G. CO., 208, U. S. 404; ILLINOIS SURETY CO., vs. U. S. to use, &c., 240, U. S. 214; U. S. F. & G. CO., vs. BRAY, 225, U. S. 215), and it is only in that way that the cases got into the United States Court and following them the equity case, which is now before the bar of this court on this appeal, gets into the United States Court, and therefore this is not a case the decision of which in the Court of Appeals is made final by the Acts of Congress. The United States is concerned as the real party, as was decided in 204 U. S. 349. The public contracts, such as are involved in this case, are matters of public interest, Laura Eichel's claim is under and through the United States.

Laura Eichel borrowed the money to buy most of these claims from banks at Evansville, Indiana, Bray endorsing for her. In December, 1906, (see p. 121 of the first record) Laura Eichel paid the interest up to that time; Bray lifted the note from the bank, and has been carrying it ever since. It amounts to $27,037.39. Laura Eichel has paid the interest to Bray up to December, 1914, and he has sued her on the note at Evansville. He holds these claims as collateral.

Your petitioners are advised that this case is one of special and peculiar circumstances covered by Sec. 7 of Rule 26 of this Court. They labor under great difficulties and inconveniences by reason of the probable delay in the hearing of this case if it takes its usual course on the docket. It is necessary for a definitive settlement of the affairs involved in this litigation that your Honorable Court should hear and determine and announce the principles which should

govern and settle the matters both in the court at Pittsburgh and at Parkersburg.

Your petitioners therefore pray that an order be made advancing this case for hearing orally before the court, or that the case be set down for some early day to be heard.

And they will ever pray, etc.

LAURA EICHEL,
MADISON J. BRAY,
PHILIP W. FREY.

By their Attorney,
WM. M. HALL.

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY. } ss:

On this ....11th.... day of September., 1917, before me, a Notary Public in and for said State and County, personally came William M. Hall, Attorney for the appellants, Laura Eichel, Madison J. Bray and Philip W. Frey, who, being by me duly sworn, says that the statements of fact set forth in the foregoing petition are correct and true, as he verily believes.

....(sgd.) Wm. M. Hall....

Sworn to and subscribed before me the day and year aforesaid.

My commission expires February 21, 1919.

....(sgd.) Sue B. Fritz....
Notary Public.

(Seal)

Supreme Court of the United States

No. 571

OCTOBER TERM, 1917.

LAURA EICHEL, MADISON J. BRAY and PHILIP W. FREY,

Appellants

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Appellee.

Appeal From The United States Circuit Court of Appeals For The Third Circuit.

Notice and Motion to Postpone Hearing of Appellants' Motion to Advance, Until October 15th, When Motions to Dismiss or Affirm are Returnable.

WM. E. SCHOYER,
Oliver Building, Pittsburg, Pa.
B. M. AMBLER,
Parkersburg, W. Va.
Counsel for United States Fidelity & Guaranty Company.

And now comes the United States Fidelity & Guaranty Company, Appellee above named, by B. M. Ambler and William E. Schoyer, its counsel, and moves the court to *postpone until October 15th*, consideration of a petition of the appellants to *advance the hearing* of this cause, returnable on October 8th—to the end that the motion to advance, and the motions to dismiss or affirm may be heard and considered together, the appellee having served notice for October 15th, of Motion to Dismiss or affirm.

NOTICE

In the Supreme Court of the United States.

To Laura Eichel, M. J. Bray and Philip W. Frey, Appellants, and to W. M. Hall, their counsel:

Whereas, You have caused to be served on the Appellee a notice that you will file a petition to advance the above-entitled cause, on the second Monday of October, 1917, in the Supreme Court of the United States, at Washington; and, whereas, the Appellee has prepared and served on you a notice of motions to affirm or dismiss the appeal, which motions of the Appellee are noticed and are returnable for the 15th day of October, 1917,—

Now, you will please take notice, that the undersigned will, on the second Monday in October, 1917, move the Supreme Court to postpone and adjourn until October 15th, your motion and petition to advance the cause—to the end

that the motion to advance and the motion to dismiss or affirm may be heard and considered together.

Very respectfully,

WM. E. SCHOYER,
Oliver Building, Pittsburg, Pa.
B. M. AMBLER,
Parkersburg, W. Va.
Attorneys and Counsel for United States Fidelity & Guaranty Company, Appellee.

Supreme Court of the United States

No. 571

OCTOBER TERM, 1917.

LAURA EICHEL, MADISON J. BRAY and PHILIP W. FREY,

Appellants

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Appellee.

Appeal From The United States Circuit Court of Appeals For The Third Circuit.

NOTICE AND MOTIONS TO DISMISS OR AFFIRM.

WM. E. SCHOYER,
Oliver Building, Pittsburg, Pa.
B. M. AMBLER,
Parkersburg, W. Va.
Counsel for United States Fidelity & Guaranty Company.

MOTION TO DISMISS

Now comes the United States Fidelity & Guaranty Company, by B. M. Ambler and William E. Schoyer, its counsel, and moves to dismiss, with costs, the appeal herein

taken by the above-named Laura Eichel, M. J. Bray and P. W. Frey, upon the ground, that this court has no jurisdiction of the same upon the questions submitted, and because the assignments of Error are not specific, nor do they state as particularly as may be, in what the decree is alleged to be erroneous; and because the Appeal is otherwise informal, irregular and insufficient;

1. The jurisdiction depends solely upon the existence of a Federal question in the bare fact that the litigation involves the liability of the Appellee as surety for a contractor on government works, under bonds conditioned to pay material claims, as required by Act of Congress; but there is no controversy about the construction or interpretation of any statute or any bond. The appellee, as surety on bonds of a contractor who was adjudged Bankrupt, has sought relief in Equity, because *it is liable* for the claims in question; while the appellants claim that they are entitled to recover against the surety, because the *surety is liable*. The proposition on which the case turns is, that while by the undisputed terms of the Bonds and of the law, the appellants are entitled to recover *whatever may be the just amounts* of these several claims; yet, the claims in suit having been bought by Bray, Trustee, Eichel salaried manager, and Frey, the counsel of the Bankrupt estate, they are not entitled to recover any profit on claims constituting liens upon the estate, which they bought at a discount.

The controversy is upon the amounts recoverable: dependent on general principles of law and equity.

(b) There is no question whether the materials are within the bonds. Both sides claim that. The Courts below have passed upon some eighteen claims, and have held the appellee liable upon each, but for amounts less than their face, and have refused to allow any amount in excess of actual cost; and, with regard to one claim (Clydesdale Stone Co.) it was adjudged that several pay-

ments having been made by the contractor, before Bankruptcy, and no appropriation having been made by either the debtor or creditor; the law applies the payments to the older debt; especially where the attempt was made, two years after the payments were made, and some months after Bankruptcy occurred, *to apply the payments*, not to old debts for which the surety is liable, but to more recent transactions, so as to create a liability of the surety. (Rec. Vol. I, pp. 515-516.)

2. The only controversy goes "to the principles of general law" involved; as to the right of fiduciaries to speculate and profit, on claims against their trust; and as to the application of payments. These having been rightly applied by the Circuit Court of Appeals, the Supreme Court will not entertain jurisdiction, as to details, or matters which were intended to be excluded from this Honorable Court, by the Act creating Courts of Appeal.

3. The record shows, the prevalence of these controversies between this surety and these fiduciaries for many years, in every grade of Federal Court, having jurisdiction in Pennsylvania, and in West Virginia; and this appeal works great hardship and delay.

4. The assignments of error, are not specific as required by Rule 21 (2), and present matters immaterial.

5. The appellee moves to dismiss said appeal on other grounds arising upon the record.

MOTION TO AFFIRM

And the Appellee further moves the Court to affirm the decree and judgment of the said Circuit Court of Appeals for the Third Circuit, herein, upon the ground that it is manifest that the appeal herein was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

IN THE SUPREME COURT OF THE UNITED STATES

NOTICE

To Laura Eichel, M. J. Bray and Philip W. Frey; and Mr. W. M. Hall, their counsel:

You will please take notice that we shall, on Monday, the 15th day of October, 1917, (and if motions are not then heard, then at the next succeeding motion day of the Court,) make and submit to the Supreme Court of the United States, at a term thereof, to be held in the Capitol in this City of Washington; the motions, copies whereof are herein set forth; and we shall move said court, for an order dismissing the appeal taken herein by the above named Laura Eichel, M. J. Bray, et al.; upon the grounds, specified in said motions respectfully:

MOTION TO AFFIRM.

The appellee further gives notice, that it will move the Supreme Court to *affirm* the decree, decision and judgment of the said Circuit Court of Appals for the Third Circuit, upon the grounds, that it is manifest that the appeal herein was taken for delay only, and that the questions on which the decision of the cause depends, are so frivolous as not to need further argument.

These motions will be made upon the papers and proceedings in the above cause, and upon the Printed Brief, copies of which we herewith serve upon you.

WM. E. SCHOYER,
Oliver Building, Pittsburg, Pa.

B. M. AMBLER,
Parkersburg, W. Va.
Counsel for United States Fidelity & Guaranty Company, Appellee.

Supreme Court of the United States

No. 571

OCTOBER TERM, 1917.

LAURA EICHEL, MADISON J. BRAY and PHILIP W. FREY,

Appellants

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Appellee.

Appeal From The United States Circuit Court of Appeals For The Third Circuit.

ANSWER TO MOTIONS TO DISMISS OR AFFIRM

Wm. M. Hall,
2128 Oliver Building, Pittsburgh, Pa.
Attorney for Appellants.

Our answer to the motion to dismiss or affirm is as follows:

1. We know that in cases where the decision of the Court of Appeals is not made final the Supreme Court will not deter-

mine the sufficiency of evidence, as a general rule. We must show that "plain error" has been committed. What we attempt to show is:

(*a*) In 1907, at Pittsburgh, Laura Eichel brought her suits on these claims. The Circuit Court for the Northern District of West Virginia (Judge Dayton), without an opinion, enjoined her suits. It took until 1912 to get this injunction cleared off in the Supreme Court (225 U. S. 205), and the Supreme Court heard this Guaranty Company then. Why should it not hear us now? This cost us more than five years of time.

(*b*) The District Court at Pittsburgh heard our cases, and not a line of evidence was introduced by the Guaranty Company that proved their case. The District Court's Finding shows that these claims were bought by Laura Eichel, Bray assisting her, with the full knowledge and consent of the surety company in creditor's meetings, through its agent, Mr. Wood, and attorney, Mr. Ambler, who is of record in this case and of the Referee (the Court itself), p. 208 first record. (See Judge Orr's opinion, pp. 407 to 414 of the first record.)

(*c*) While we were trying our cases at Pittsburgh, the Circuit Court for the Northern District of West Virginia, Judge Dayton, who had granted the injunction against us, without any jurisdiction or power to decide in a plenary way and solely upon the petition and instance of the surety company, and without a hearing of Laura Eichel's case, reduced the claims to what had been paid for them, and then awarded all of the funds to pay 66 2-3 per cent. of the reduced claims, and this at the very time the court at Pittsburgh was hearing the bill of the surety company, in which they prayed the court to take full jurisdiction and decide all matters.

(*d*) On the appeal to the Circuit Court of Appeals for the Third Circuit by the surety company upon Judge Orr's decision, the Circuit Court of Appeals took the decision of Judge Dayton, his findings of fact, and in no way gave any force to Judge Orr's findings (pp. 513 to 520 first record).

WE CLAIM, THEREFORE, THAT THERE WAS THE PLAINEST ERROR OF LAW COMMITTED BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT. We claim that we have been held up for over ten years by this surety company on a claim of alleged fraud and that the only time they ever faced Laura Eichel in a court (namely, at Pittsburgh) they failed to produce any evidence substantiating the claim. The chancellor, Judge Orr, who heard that case, in his opinion completely decides against it. We know that no trustee can have a secret profit in his trust, and we are aware of the late case of the Supreme Court, MAGRUDER VS. DOWNEY, 235 U. S. 160, but we claim that in no court, if we can explain our case aright, should this surety company be allowed to get Laura Eichel to buy up these claims to help them out and keep their creditors from their back, and induce Bray to aid by endorsing for Laura Eichel, and then repudiate the thing after their agent, Wood, and their attorney, Mr. Ambler, had commended it and the Referee had allowed it to be done. "Some things lie too deep, in the common sense and common honesty of mankind, to require either argument or authority to support them; and this, I think, is one of them." STEAMBOAT CO. VS. McCUTCHEON, 13 Pa. 13, cited in the opinion of the Supreme Court, 101 U. S. 181.

If the Court of Appeals took the decision in 225 U. S. 205, 218, BRAY ET AL vs. U. S. F. & G. CO., as deciding that the District Court at Pittsburgh, in which our cases were pending, did not have plenary jurisdiction and that the bankruptcy court in West Virginia had exclusive jurisdiction (that is, to exclude the jurisdiction of the court at Pittsburgh) certainly that must have been an erroneous view. This may have been the view of the Court of Appeals. (See p. 516 of the first record.) If so, there is still further error of law. The point was fully covered by Judge McPherson in U. S. for use of GENERAL ELECTRIC CO. vs. SCHOFIELD, 182 Fed. 240 D. C., 187 Fed. 98, in the Third Circuit, where it was claimed that proving claims in bankruptcy prevented a suit against the surety. This was negatived by the Court of Appeals and a certiorari was

denied by the Supreme Court on October 23, 1911. (See 223 U. S. Memorandum Cases, 719.)

II. On the Clydesdale Stone Company case, it seems out of place to present anything on a motion like this, but that matter is very simple. The debtor never applied the payment—the creditor did—in the way it suited him best. Judge Orr found (p. 412 of the first record): "The creditor made an appropriation at the time the claims were assigned by it and distributed the claim by proper apportionment to the several contracts." All the law on this subject is substantially gathered together in Chief Justice Marshall's opinion in FIELD VS. HOLLAND, 6 Cranch, 8, as elaborated by the editors, Hare & Wallace, in 1st American Leading Cases, p. 334.

RESUMÉ.

THE POINT WE SUBMIT IS NOT ONE OF FACT OR OF WEIGHING OF THE SUFFICIENCY OF EVIDENCE. WE CLAIM, WITH ALL DUE RESPECT TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, THAT IT WAS FUNDAMENTALLY WRONG FOR IT AS A MATTER OF LAW TO PASS OVER THE FINDINGS OF THE CHANCELLOR WHO TRIED THIS CASE AND TAKE THE FINDINGS OF FACT OF THE JUDGE IN WEST VIRGINIA WHO HAD ENJOINED THE CASE AND WHO HEARD NONE OF THE TESTIMONY.

Respectfully submitted,

WM. M. HALL,

Attorney for Appellants.

Supreme Court of the United States

No. 571

OCTOBER TERM, 1917.

LAURA EICHEL, MADISON J. BRAY AND P. W. FREY,
Appellants.

vs.

UNITED STATES FIDELITY & GUARANTY CO.,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR APPELLEE UPON MOTION TO DISMISS OR AFFIRM.

GLOBE PRINTING & BINDING CO., PARKERSBURG, W. VA.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR APPELLEE UPON MOTION TO DISMISS OR AFFIRM.

A petition has been filed by the appellants to advance this cause, which was docketed since June 1, 1917.

The case involves no public question nor one of general interest. The appeal is but a continuation of the effort of the appellants to reverse decisions, which have been held by two Circuit Courts of Appeal, deciding that a Trustee in Bankruptcy will not be permitted to reap profit, from buying claims that are a lien upon the estate of the bankrupt; nor can others who are associated, or who have loaned their names to the scheme, recover more

than the amount actually paid. We have only the application of two general principles of law—(1) that a trustee cannot speculate on his trust whether acting alone or in concert with others; and, (2) that if neither the debtor nor the creditor makes an application of payment among several debts, at the time the payment is made, then the law will apply the money to the oldest debt. (Record No. 2, page 515.)

The settlement of the Bankrupt's estate, and of the liability of this surety, has been delayed for many years, because of the effort of Eichel and Bray to take forbidden fruit.

We respectfully protest against being delayed further by this appeal, and we are not forestalled, *by the filing of a Petition to advance*, where it cannot be granted.

The litigation growing out of the speculations of Bray, Trustee, in the name of Laura Eichel, have become a reproach to the delays of the law.

Intimations are given in the Petition filed for the appellants, that the delays are attributable to the fault of this surety, which has prevented the appellants from appropriating a fund in Bankruptcy, and from unjustly depriving this surety of large sums of money.

The appellee would most cheerfully assent to advance the hearing; but fully convinced that this is not a case of the class where the court will postpone other causes, the appellee respectfully submits, that the proper way to make early disposition of it, *is to dismiss or affirm.*

We are aware that the Supreme Court will not entertain a motion to dismiss or affirm, merely on the suggestion

of the appellee, that there is no merit in the appeal; but the appellants have here filed a motion to advance the cause, which *invites an examination of the record;* and such examination discloses, that the appeal is frivolous, wholly without merit, and makes for delay only.

The appeal is brought here as presenting a Federal question, in the mere fact, that the United States Fidelity & Guaranty Co. is *the surety on bonds of a Government contractor,* the several proceedings involving material claims for which this surety is liable, under the Act of Congress of 1894, relating to such. *Both sides admit that the surety is liable for these claims. No question whatever arises upon the construction of any bond or statute, the controversy has regard solely to the amounts.*

The color of ground for claiming that the Supreme Court has technical jurisdiction on this appeal, rests on the bare fact that this surety executed some four bonds for a Government contractor, the Evansville Contract Co.; and this contractor became indebted to sundry persons for material, which by the terms of these bonds, the surety undertook to pay.

The contractor went into bankruptcy in West Virginia. M. J. Bray was appointed trustee. The creditors of the bankrupt, and the court, resolved to continue the business and finish the jobs, (Record, p. 101,) and pledged that the surety should be indemnified, if the creditors through the trustees, were permitted to carry on the work and to make the expected profits. (Record, p. 105); and on April 11, 1904, at this creditors' Meeting, it was decreed that Jacob Eichel, former president, should be employed at a salary, as manager. (Record, 103.)

Immediately after that order was passed, M. J. Bray, Trustee and Eichel, Manager and Frey, the general counsel

for the bankrupt's estate, commenced to buy these material claims, at a large discount, in 1904, (Vol 1, p. 121.) They were taken in the name of Frey, and were paid for by Bray, Trustee (194-199.) They constituted liens on the estate of the Bankrupt.

In November, 1904, the Referee was called on, to ascertain what were the claims that were thus preferred. The claims were listed, no one having the least knowledge that they had been bought up at a discount by Bray, trustee, through the instrumentality of the general counsel of the estate. (Record, p. 114; Bray, 194-199, Frey 302, Ambler 268-9.)

Subsequently, on December 12, 1904 (Record, p. 115) Mr. Frey, at Bray's request, served notice on Mr. Bray, that Frey is the owner of those claims, and is entitled to one-half of the profits thereon. (Vol. I, pp. 120-122, where are shown the face value and purchase price of each claim.) Bray carried these claims on his books as "Frey Accounts." (p. 199.) Frey testified, that he understood from the beginning in 1904, that Bray was to be compensated (300-302) that Frey suggested the plan (p. 297), that Bray requested Frey to write the notice of December, 1904 (306), stating that Frey was the owner of the claims. This notice provides that one-half of the profits shall be left in the Bank for a mysterious party (302), who Frey admitted was understood to be Mr. Bray (p. 302.) Jacob Eichel pretends that it was not understood, until December 31, 1906, that Bray was to have a profit; but he admits that in the year 1907, he had sworn that the bargain to pay Bray was made in the spring of 1904 before any claims had been bought, and that it had been then agreed, that Bray should be paid one-half of the profits from the transaction. (pp. 369, 370.) The decision made below, that Bray, Frey and the Eichels were all parties to buying these claims at a discount, is controverted by no witness what-

soever; but an attempt was made by Eichel and by Frey, to contradict their former sworn statements as to the time of the arrangement, when it was understood that Bray should divide the profits; and the time when this understanding was had, is wholly immaterial—Bray is still Trustee.

In September, 1907, the surety discovered that Bray, trustee in bankruptcy of the contractor, had purchased at a discount, claims for material, constituting a first lien on the assets of the bankrupt estate, for which this surety was liable. Meantime, the surety had applied to the court of bankruptcy at Parkersburg, W. Va. to compel the trustee in bankruptcy to apply the net funds of the estate to the satisfaction of these material claims, and to ascertain what were the proper claims having right to share in that fund, that being the primary fund for the satisfaction of the claims. (p. 268, 269.)

Prior to that Bray had caused suits to be instituted at Pittsburg, Pa., about twenty in the state court, and about as many more in the District Court of the United States for the Western District of Pennsylvania. Upon discovery that Bray, in connection with Eichel and Mr. Frey, had purchased these claims at a discount, the Fidelity Co., appellee, filed a bill in the *Circuit Court* of the United States for the Northern District of West Virginia, praying that those suits at law brought in Pittsburgh in the name of Laura Eichel, be enjoined; that the fund in bankruptcy should be treated as the primary fund; that all claims having right of recourse thereon be ascertained; that the liability of this surety might be determined; and that a lien be decreed on the assets of the bankrupt for the amount of the material claims.

That case went to the Supreme Court and the bill was dismissed, on the ground that the *District* Court in

Bankruptcy could alone adjudicate the amount of claims, and the existence of a lien upon property that was being administered in bankruptcy. The case is fully set out in the opinion in U. S. Fidelity Co. vs. Bray, 225 U. S. p. 205. In accordance with the ruling of the Supreme Court, the Fidelity Co. next filed a petition in the District Court of West Virginia in bankruptcy. The Referee there decreed January 4, 1913, that the claims for material which had right of recourse on the bonds of this surety, *were first liens upon the estate of the bankrupt, and that they must be reduced to actual cost without profit, because the parties trafficking in these claims were fiduciaries;* and a decree was entered by the Referee, that 66 2-3 per cent should be paid on the claims, as reduced, and those dividends were made payable to Mr. Bray personally, because he had paid the money and was entitled to be reimbursed. (Rec. 142, 147.) This is fully shown in the opinion of the Third Circuit (p. 516.)

Bray and Eichel and others took an appeal from that Referee's ruling, which was emphatically affirmed by the Judge of the District Court, in West Virginia who held that the name of Laura Eichel was but a mask and a screen for Bray, Trustee; that the scheme was fraudulent and inequitable, and the Referee's findings were affirmed. (Rec. No. 1 p. 516.) From that decision Bray and the Eichels took an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, and the decisions of the Referee and of the District Court were there unanimously affirmed.

Bray and the Eichels then took an appeal to the Supreme Court of the United States from the decision of the Fourth Circuit, and that appeal was dismissed. 239 U. S. 628.

It thus became final and conclusive in the Federal Courts in West Virginia, that Bray, Trustee, and the

Eichels were fiduciaries forbidden to traffick in these claims, and that the claims must be purged of profit and constituted a lien on that fund.

The appellants several times represent in their petition, that Laura Eichel was no party to those proceedings in bankruptcy. This ought not to have been so stated. Those claims were filed in her name, in bankruptcy, in West Virginia. Laura Eichel took exceptions to the Referee's report, *in bankruptcy*. She was a party to the appeal to the United States Circuit Court of Appeals for the Fourth Circuit, and a party to the appeal to the Supreme Court, which was dismissed in 239 U. S. 628, and the records in this Court, show that she was party and appellant.

Bray and Eichel v. U. S. F. & G. Co., 239 U. S. 628.

In the United States District Court for Western Pennsylvania, these numerous actions at law were still pending, against the Fidelity Co.

After the decision in 225 U. S. 205 the bill was filed in this present case, impleading Bray and Eichels, enjoining the prosecution of the numerous actions at law, and praying the Court to determine the amount of each claim, to purge them of profit, and to require that whatever amounts the court should ultimately find, should be credited by the dividends that had been awarded in bankruptcy against the primary fund.

The Honorable District Court of Pennsylvania refused to recognize the equities, and rendered a decree in favor of Laura Eichel for the full amounts of all of these claims.

The Fidelity Company took an appeal to the Court of Appeals for the Third Circuit, which reversed the court below and granted the relief prayed. Record No. 1, p. 513,

—and a reading of that opinion will dispel the illusory comments of the petition filed here by the appellants. The unanimous opinion of the third Circuit sets out the entire case. At page 516, it quotes fully from the decisions in West Virginia and distinctly rules, at page 520:

"We need not determine whether this decision in the Fourth Circuit bound Laura Eichel under the rule of res judicata. Assuming that she may not be bound, we have considered *the evidence, independently*, and agree with the appellant (Fidelity Co.) *that Bray, Frey and the Eichels were parties to a plan to buy the claims at a discount*, in order that Bray might share in the profits of the transaction, and a court of equity cannot sanction such conduct."

Eichel and Bray took an appeal to the Supreme Court from that decision, which was dismissed. 239 U. S. 629.

Thereafter, the District Court in Pennsylvania entered a decree (Record No. II, page 159,) on December 6, 1916.

From that decree Laura Eichel, Bray and others took an appeal to the Circuit Court of Appeals for the Third Circuit, where, on April 16, 1917, was rendered the second decision now complained of. Vol. II, p. 174.

So it is, that the Fidelity Co. has prevailed in all the Federal Courts in West Virginia, and twice in the Circuit Court of Appeals in Pennsylvania, upon two plain elementary principles—(1) denying profits to fiduciaries in speculating on claims against the estate; and, (2) with regard to the one claim of the Clydesdale Stone Co., it was decided that payments that were made prior to the bankruptcy, and had *not been appropriated* by either debtor or creditor, on any particular account, should be applied to the older claims. (Vol. I, p. 515, 516.)

It is clear on this Record, that Jacob stated the truth

in 1907, when he testified that the bargain to divide profits with Bray was made in the spring of 1904, (Record, 369-370); and that Mr. Frey was right when he said that his notice of December, 1904, addressed to Bray, was written at the request of Bray, stating the claims owned by Frey, and the division to be made between Frey and Bray. (Record, 300-302, 306.) The unanimous findings of six Judges of the United States Courts of Appeals for Third and Fourth Circuits, and the findings of the District Court and the Referee in Bankruptcy, are all in accord; and the Judges of the Third Circuit having made an independent examination of these court records, reached the same conclusion. (p. 520.)

It is hardly conceivable that the Supreme Court could reach a different result, where, upon such a mass of testimony and of pleadings, the courts below have, for years and months, and at long intervals, gone through all the details. Nor can we imagine that the Supreme Court will deem proper to delve into testimony, in order to get a basis of calculation to upset the sums decreed with regard to these eighteen separate claims, in the present record.

Res Judicata

The scaling of the claims so as to eliminate all profits, has been settled in such manner, as to relieve the Supreme Court of reconsidering it.

The determination of that point contained in the opinion of the Third Circuit, appealed from here, at page 520 of the Record No. I, has passed beyond the power of this court, to review or reverse,—"*that Bray, Frey and the Eichels were parties to a plan to buy the claims at a discount, in order that Bray might share in the profits of the transaction.* * * * * *A court of equity cannot sanction such conduct.*

Of course, this estoppel by record, does not arise, because it has been so decided in the Third Circuit, under the decision challenged on this appeal; but it does arise from the decision in Bankruptcy in the Fourth Circuit, as follows:

(a) On January 13, 1913, the Referee in Bankruptcy in West Virginia, at page 137, of Record No. I., decided (p. 144), "that the several preferred claims * * * * held by M. J. Bray under an arrangement whereby said Bray, Trustee of the Bankrupt, endorsed the notes upon which was obtained money, expended in the acquirement of said claims, and now holds the same *with the interest in profits to be derived therefrom* * * * * *. The court doth find that said claims *were acquired and held under such circumstance that the same are* allowed respectively for the amounts only at which they were purchased, with six per cent interest thereon, and not for their face value."

The Referee then declared a dividend of 66 2-3 per cent on the claims as reduced, payable to Bray, *personally.* (pp. 147-148.)

(b) That decision is recited in the opinion of Judge McPherson in this case (p. 516 and following.) Subsequently, Laura Eichel, Bray and others took the Referee's decision to the Judge of the District of West Virginia, to revise. The Judge affirmed the Referee's order, and held the whole arrangement was fraudulent. (See Record No. I, page 518 and following.)

On December 7, 1914, the Court of Appeals for the Fourth Circuit affirmed the District Court, saying in a brief per curiam, "it is unnecessary to repeat the argument in support of these conclusions." (Rec. No. I, p. 520.)

(c) Subsequently, on February 3, 1915, (Rec. No. I,

521,) the Circuit Court of Appeals for the Third Circuit in this present equity case made its decision, having the Record of the Fourth Circuit then before it.

(d) Laura Eichel, Bray and others took appeals from both of these decisions (from Third and Fourth Circuits) to the Supreme Court of the United States.

(e) On November 8, 1915, upon motions heard together in these two cases, both of the appeals were dismissed. 239 U. S. 628-629.

(f) The appeal in the bankruptcy proceeding was dismissed because *the law denies an appeal in bankruptcy to the Supreme Court, unless it is brought up on certain conditions*, failing which the decision of the Circuit Court of Appeals of the Fourth Circuit, became final in the jurisdictional sense.

The appeal in this equity case was dismissed, because it had not reached the final stage.

(g) The principle adjudicated in the Fourth Circuit, prior to the decision in the Third Circuit, has now been irrevocably fastened as an estoppel, by the action of the Supreme Court in holding that these parties could not go beyond the decision of the Court of Appeals of the Fourth Circuit.

We earnestly submit, that we have here a final decision of a question between identical parties, in a Court of last resort, and this decision in the Fourth Circuit is a conclusive estoppel upon them, even if otherwise there could be any doubt upon a matter so well settled as to fiduciaries.

Your Honors would be constrained to hold that decision of the question of law, as pronounced by the Fourth Cir-

cuit, an estoppel on these parties, even though the court should believe that decision was wrong.

In Louisville Bridge Co. v. U. S., 242 U. S. 410, it was urged that the Supreme Court had affirmed a decision of the Court of Appeals for the Fourth Circuit, holding that, in the absence of any reservation in an Act of Congress authorizing the construction of a bridge, the United States could not abate it, as obstructive, except upon compensation, citing U. S. vs. B. & O. R. R., 229 U. S. 244. But the Supreme Court declared (242 U. S. 421) that it wholly disapproved the legal propositions announced by the Court of Appeals as quoted; (U. S. vs. R. R. Co. 134 F. 969; 143 F. 224;) and the opinion of Mr. Justice Pitney, at page 423 (242 U. S.) then made plain, that in 229 U. S. 244, the decree of the Fourth Circuit was affirmed, on the doctrine of *res judicata*, on the ground, that in a previous decision, prior to the one under review, the Court of Appeals had decided that the United States could not alter the particular bridge in question without compensation; and thus that principle had become "the law of the case," binding the parties, although erroneous.

These Appellants were Parties in Bankruptcy Case.

The other side claim that Laura Eichel was not a party to these Bankruptcy Proceedings, although she was such party, at every stage.

(a) She filed an answer in bankruptcy, as recorded in the Referee's decree of January 4, 1913, where the case is heard "upon the separate answer of Laura Eichel upon the answer of M. J. Bray in his own right and as trustee," etc. (p. 140, Vol. I.)

(b) Laura Eichel and Bray and Jacob Eichel took

that matter for review to the District Judge, and, next, they carried it on appeal to the Circuit Court of Appeals for the Fourth Circuit, and thence to the Supreme Court. * * * * The record in the Supreme Court still here remains, as **No. 354 for October, 1915,** on which was rendered the decision of 239 U. S., which refused to open that bankruptcy case.

The very title of that Bankruptcy proceeding, in the Supreme Court of the United States, is "October Term, 1915, No. 354, M. J. *Bray* * * * Jacob Eichel, *Laura Eichel*, etc. vs. United States Fidelity & Guaranty Co., Appellee." It is not necessary to turn to that record, but it shows—the Answer of Laura Eichel (p. 255); her petition to review the Referee's decision (p. 439); the opinion of the District Judge, holding that the entire scheme was fraudulent, and that Mrs. Eichel was a mask for her husband, and Bray, is given (p. 489) the order by the District Judge, affirming the Referee, p. 492, and all of these matters have now been quoted, cited and approved, and made part of the decision of the *Third Circuit.*

See opinion Present Record No. I p. 513.

The law regarding application of payments is well-settled as stated in the opinion of the Third Circuit. Record No. I, pp. 515-516.

A credit or payment should be applied to the one of two debts that is first due.

McGillin v. Bennett, 132 U. S. 445.
Hollister vs. Davis, 54 Pa. State 508.

As a general rule, payments not applied by the parties are applied by the law to the oldest of several debts.

Rowan v. Chenoweth, 55 W. Va., 325, 329.

In Nat. Bank v. Mech. Bank, 94 U. S. 439, "*the rule*

settled by this court as to the application of payments, is, that the debtor or party paying the money may, if he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice. Neither of the parties can make it after a controversy upon the subject has arisen between them."

The exact ruling by the Court of Appeals here complained of, is, (Rec. No. I, pp. 515-516,) if the debtor makes no selection, the creditor has the right of application. If neither acts at the time of payment, the law applies the money to the oldest debt. * * * * The Stone Company had no right to make a nunc pro tunc application two years after the payments had been made and several months after the principal debtor had gone into bankruptcy. The rights of creditors against the estate had then been fixed, and the Stone Company could not change them. (p. 516.)

All of the delay and litigation of the past twelve years constitute a hardship on this surety, and the taking of this present appeal, adds to the wrong. We cannot collect damages here for frivolous appeal, as in the case of one who complains of a money judgment against him, because we want to get these things settled, and we are here prevented from a long sought adjustment, because the Eichels and Bray are still seeking to reverse the established law which denies profits to a fiduciary against his estate or his surety.

The reason why this Fidelity Company is the "only person who resists" unconscionable advantage sought by the other side, is that the proper person to defend against such attacks upon the bankrupt estate, is *Bray, Trustee*

and this surety, who has been adjudged a lien on that bankruptcy fund, is obliged to protect itself against that faithless trustee.

A suggestion is made in appellants' petition (page 12), which is intended to convey the idea, that this surety company and its counsel had full knowledge and gave glad consent that Mrs. Eichel and Trustee Bray were buying these claims at a discount in 1904, and that therefore the surety became estopped and cannot decline to pay, at par, claims purchased by fiduciaries at a discount; and next we find at the end of the capitalized paragraph, "that Bray never had any compensation agreed or suggested *until over two years after the claims were purchased.*"

These statements are suicidal. It is impossible, that the surety or its counsel could know in 1904, that Bray was interested in making profits in those claims, if he did not acquire such an interestprior to 1906. The record distinctly shows (Vol. I, pp. 116, 119-121,) that Bray and Frey were concealing their transaction; that Frey, counsel for the estate, certified to Bray, its custodian, (Vol. I, p. 114,) that Frey himself was the *sole owner* of those claims, subject to a dividing of the profits. It is obvious, that Bray could not deny having an interest *as early* as 1906, because on December 31, 1906, (Record, Vol. I, p. 116,) is found a note of that date, and on that date (at page 124) it appears that Jacob Eichel paid all of the interest, and Laura had paid nothing. But it is wholly immaterial what was the date of an agreement to divide—Bray is still Trustee.

Where no Federal question is in controversy, the Supreme Court recognizes that the case is of the character where the law intended the decision of the Court of Appeals to be final, and in such event the Supreme Court will only determine whether plain

error was committed in relation to the principle of law involved.

Yazoo & M. R. R. Co. v. Wright, 235 U. S. 376.

"Although there may be jurisdiction * * * * where none of the contentions directly invoked the interpretation of the statute, but merely the question, whether, on the evidence, there was right of recovery * * * * this court will only examine the record to see if plain error has been committed; and if that is not apparent, it will affirm."

Chic. R. R. Co. v. King, 222 U. S. 224.

Where the writ presents no question for decision concerning the interpretation of the act, but only consideration of *general law*, this court will not reverse, unless it clearly appears that error has been committed.

Southern Rwy. Co. v. Gadd, 233 U. S. 572.
(Where the Court imposed 5 per cent damages.)

To same effect—

Chic. R. R. vs. Brown, 229 U. S. 317.
T. & P. R. R. v. Howell, 224 U. S. 577.

Where the question involves "a mere dispute concerning the weight of conflicting tendencies of proof," the Supreme Court will not go into it.—Chic. R. I. & P. Co. vs. Devine, 239 U. S. 52,—And a complaint against the announcement of a well-settled rule and principle of law, "must exclude all ground for the contention which the proposition makes." Ib. p. 54.

Penn. R. R. v. Donat, 239 U. S. 50.

The Assignments of Error raise no Federal question, and are based upon generalities, and not in accordance with the Rules, and are upon points that are irrelevant and immaterial. (Vol. II, p. 178.)

The errors complained of are—

FIRST.—Because the court did not render a decree (on eighteen claims) so as to aggregate $66,534.20. (This is too general to be considered, or to impose on the court re-calculations on the eighteen claims.)

SECOND.—Because "Fidelity Co. was fully informed before Laura Eichel purchased these claims, that it had been proposed that she should do so; * * * * and that Bray, the trustee, should enable *her to do this by helping her;* * * * * and this was consented to and approved by the Fidelity Company by their agent and their attorney."

THIRD.—Because the bill of complaint is founded upon the allegation that Jacob Eichel made an agreement by which he was to buy these claims. (This is a reckless inaccuracy.)

These Second and Third Assignments are wholly irrelevant. We dissent from the statements therein contained, but they do not even suggest that the Fidelity Company suspected or sanctioned the purchase by *Bray, Trustee, of any of these claims at a discount.*

FOURTH.—Because these claims were purchased in the year 1904, and it nowhere appears in the record, nor is it a fact, that Bray was interested as part owner at that time, or until November, 1906.

(Frey certifies to Bray, Vol. I, p. 114, that Frey owned the claims, and that Bray must pay Frey one-half of the profit. pp. 300-302. Jacob Eichel testified in 1907, that the contract was made with Bray in the spring of 1904, and that Bray should be paid one-half of the profits.)

That whole subject has been reviewed by the Federal Courts of West Virginia, and was affirmed in the Fourth Circuit.

In the opinion of the Court of Appeals for the Third

Circuit, this matter is incorporated in the record, at pages 516-519, where it is approved of in the Third Circuit.

Quoting from page 518, of the present record: "the contention of Jacob, that he had an understanding with Wood, the agent of the Bonding Company, that he was to buy up these claims, and that he did it with his consent, *does not alter the situation.* * * * * I would infer that Eichel's object was to allay the anxiety of the Bonding Company. * * * * There was certainly nothing in this conversation to convey the idea that he expected to buy up claims at 65 or 80 per cent, and then collect 100 per cent from the surety. It did not relieve him of the duty he owed *to his company, its creditors and its surety.*"

Mr. Ambler the counsel testifies Vol. I, p. 268-9 that he did not learn of Brays participation in the profits until 1907.

FIFTH.—Because * * * * the court has not allowed, in taking account of the profits a reasonable attorney's fee and the expenses paid out *in acquiring the claims,* and then the loss of three per cent interest on the note under the deal that was made between Bray and Mrs. Eichel.

(That is, that these fiduciaries should be indemnified and reimbursed their expenses in the acquirement of these claims, besides being allowed for the cost of collecting them, and the litigation with this surety, and among these allowances, Mr. Frey, the general counsel of the Bankrupt Estate, and Mr. Eichel, who was employed by the creditors as General Manager, should be compensated for that trouble.)

SIXTH. Because the Court should not have stricken out Laura Eichel's half of the profits.

This Assignment seeks to reverse the rule that a participant in a breach of trust, shall not take a share of the profits.

> Michoud v. Girod, 4 How. 559-60—a case re-affirmed as late as U. S. vs. Carter, 217 U. S. 286, 308-9.

SEVENTH.—Because there was no application by the debtor in the Clydesdale Stone Co. account, and it had the right to make the application *at its convenience.*

(Such was not the decision of the Court, pages 515 and 516, where it appears, that long after payments were made by the debtor, it had been sought to so manipulate them, as to apply them on accounts with which this surety had nothing to do, in order to create a liability on this surety by failing to apply the payments on the old debts for which the surety was liable.)

EIGHTH.—Because Laura Eichel paid the Stone Co. $3,606.50, and the court allowed her but $806.17.

The District Court for Pennsylvania reduced the claim to $1,333.94 Vol. II, p. 160. The Circuit Court of Appeals held that the proper amount was only $806.17, Vol. III 176, and this Assignment of Error insists that the parties *bought that claim* for $3,606.50, and that they ought to be allowed what they *paid*, even though not 75 per cent of it was a proper claim against the surety.)

NINTH.—Because the Bankruptcy Court in West Virginia had listed that claim, at $6,185.35 for the benefit of this surety, and that the surety should not be permitted to repudiate it.

(This is a total misconception and utterly misleading.

In November, 1904, Mr. Bray procured the Referee to list up the claims that had preference, and among them, the Clydesdale Stone Co. was put in for that amount. This was at a time when nobody except the Eichels and Bray and Frey were aware that Bray had paid for that claim, and it was being carried under Frey's name, and was listed among those "Frey Accounts," in which Bray was to have a half interest. (Vol. I, pp. 114-120.)

The listing of that claim at that amount, could not benefit the surety, and it never had that effect. This surety has not paid any of these claims, and has received nothing on them. They have never been adjudicated fin-

ally until this present decree. The Eichels and Bray brought these suits in Pennsylvania, in the court that had plenary jurisdiction to determine amounts of each claim, not one dollar of which would come to this surety.

TENTH.—It is complained that the court held that Bray and Frey and the Eichels were parties to the plan to buy claims at a discount.

(All three have sworn to it, and uncontroverted papers show it. Record No. I, Vol. I, pp. 114-122. Bray 194-199, Frey 300-302. The matter is *res judicata*, under decision of Fourth Circuit.

ELEVENTH.—Copies three points from the first opinion, as rendered by the Honorable *District* Court in Pennsylvania, at Pittsburg.

This Eleventh Assignment seeks to treat the opinion of the learned District Judge as a finding of facts which should overrule the Circuit Court of Appeals.

If every suggestion in Paragraph Eleven were conceded, the matter would be wholly irrelevant.

The last four lines best illustrate the immateriality of all such matters, where the lower court came to the conclusion that no one would buy such claims at par, and therefore the conclusion is justified, "that the creditors and the plaintiff Fidelity Co. knew that *Laura Eichel was buying claims at a price less than their face, and that Bray and Frey were helping her to do so.*"

This conclusion establishes all that is necessary to sustain these judgments, to-wit: that these parties, Eichel and Bray and Frey, were engaged together in buying up these claims at a discount.

TWELFTH.—This assignment insists that Bray is entitled to a profit; but that such profit should be collected and paid over to the *general creditors;* and that the claims should not be reduced to costs, as against this surety.

In other words, that Bray should have the right to

collect the par value of the discounted claims against the assets of the bankrupt estate, and against the surety who stood for him for the completion of the contracts; and that this discount should be collected from this surety, and paid over to the general creditors.

The THIRTEENTH and FOURTEENTH, are on a question of costs, one item being for $27.00.

FIFTEENTH.—Refers again to the Clydesdale Stone Co. claim.

It is submitted that the matters presented by this appeal, are *beyond the scope of the exercise of the Appellate Jurisdiction of the Supreme Court.* In the cause in bankruptcy that came up from West Virginia, the Record from the Fourth Circuit overran five hundred pages, and we now have two volumes, one of 530 pages, while Vol. II. adds two hundred pages more.

By the action of the appellants, in their motion to advance, this court has been called upon to consider the character and the nature of this case, and the matters involved on this appeal. It is obvious upon a glance at the Assignments of Error, (Vol. II., pp. 178 and 181,) that the matters presented are bare questions of fact that have been settled concurrently by two Courts of Appeal on three separate hearings, and that this Honorable Court ought not to be concerned with details, with regard to matters that ought to be ended and terminated, as intended by the Act creating the Court of Appeals.

In U. S. Fidelity Co. vs. Bray, 225 U. S. p. 205, it was decided, that the comprehensive bill there presented, was contrary to the purpose and policy of Congress, which designed to have all questions of liens and claims against Bankrupts, *summarily disposed* of in Bankruptcy, in or-

der that the estate of bankrupts *might be rapidly closed, etc.* Immediately after that decision, the Appellee filed a petition in Bankruptcy proceedings in West Virginia, and has had the lien decided as to the assets of the Bankrupt, and the rule was announced that the claims should not be allowed in excess of their actual cost; and we have been struggling ever since to get these matters ended.

We have been obliged to contest these eighteen claims by a bill in equity, in Pennsylvania, and at last, there is a final decision by the Circuit Court of Appeals for the Third Circuit; and if the general principles with regard to the profits of a fiduciary are correct, the mere amounts which vary slightly, will never be disturbed by a court so overburdened, regarding questions which were intended to be relegated to the Circuit Courts.

For many years since 1905 the fund of some $30,000 in the Registry in Bankruptcy in West Virginia, has been awaiting distribution, and bearing 4 per cent. While these material claims have been allowed at 6 per cent. The funds are in the hands of Bray, Trustee, and the whole difficulty in ending all these proceedings, is that fiduciaries are seeking to perpetrate a fraud on the estate, and against a surety that they ought to protect.

We respectfully pray that the appeal be dismissed, or that the Decree be affirmed.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,

By WILLIAM E. SCHOYER,
Pittsburgh, Pa.

B. M. AMBLER,
Parkersburg, W. Va.

Its Counsel and Attorneys.

EICHEL ET AL. *v.* UNITED STATES FIDELITY & GUARANTY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 571. Motion to dismiss or affirm submitted October 8, 1917.—Decided November 5, 1917.

Appellant having brought a number of actions against appellee in the District Court, all cognizable there because arising under a law of the United States, appellee filed in that court a bill ancillary and dependent in form setting up a partial equitable defense to all the actions and other partial defenses to some, and praying that the whole matter be tried in equity and the legal proceedings enjoined. The bill also showed diversity of citizenship. Relief was decreed accordingly in the District Court and Circuit Court of Appeals. *Held*, that the bill was dependent and ancillary, that the jurisdiction to entertain it was referable to that invoked in the actions at law, and that the decree of the Circuit Court of Appeals was therefore reviewable by appeal. Jud. Code, §§ 128, 241.

In a much litigated case, presenting only questions of fact and well-settled questions of general law, unaffected by any ruling on any federal question, where the federal courts of two circuits had reached the same conclusions of fact independently, this court, being satis-

fied from the record and assignments, examined in the light of the opinions below, that the rulings were so clearly right that the appeal seemed to be taken without reasonable justification, and therefore for delay, sustained a motion to affirm the decree.

241 Fed. Rep. 357, affirmed.

THE case is stated in the opinion.

Mr. William E. Schoyer and *Mr. B. M. Ambler* for appellee, in support of the motion.

Mr. Wm. M. Hall for appellants, in opposition to the motion.

Memorandum opinion by MR. JUSTICE VAN DEVANTER, by direction of the court.

A motion to dismiss or affirm is presented.

In its simplest form the case is this: Laura Eichel as use plaintiff began eighteen separate actions at law against the guaranty company in the District Court for the Western District of Pennsylvania, all being cognizable in that court because arising under a law of the United States. The guaranty company, conceiving that it had a partial equitable defense, not admissible at law, which was common to all the cases, and other partial defenses in particular cases, exhibited in that court a bill describing the actions at law, setting forth the defenses, showing that nothing was in controversy beyond the defenses, and praying that the entire matter be examined and adjudicated in a single proceeding in equity and further proceedings at law enjoined. Although showing that the parties were citizens of different States, the bill was framed as a dependent and ancillary bill and the court was asked to entertain it as such in virtue of the jurisdiction already acquired. The court did entertain it and ultimately sustained the equitable defense, partly sustained some

of the others, ascertained the amount of the liability of the guaranty company upon the claims set forth in the actions at law, and ordered that this amount, with interest, be paid in satisfaction of those claims. The Circuit Court of Appeals made a small reduction in the amount of the company's liability, made provision for subrogating the company to the rights of Mrs. Eichel against a bankrupt's estate in process of administration, and affirmed the decree as so modified. 241 Fed. Rep. 357.

Plainly the bill was dependent and ancillary and the jurisdiction to entertain it was referable to that invoked and existing in the actions at law out of which it arose. *Jones* v. *Andrews*, 10 Wall. 327, 333; *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329, 333; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633; *Krippendorf* v. *Hyde*, 110 U. S. 276, 281; *Johnson* v. *Christian*, 125 U. S. 642, 645; *Carey* v. *Houston & Texas Central Ry. Co.*, 161 U. S. 115; *Cortes Co.* v. *Thannhauser*, 9 Fed. Rep. 226; *Hill* v. *Kuhlman*, 87 Fed. Rep. 498. This being so, the decree of the Circuit Court of Appeals is open to review here. See Jud. Code, §§ 128, 241. The motion to dismiss the appeal is therefore denied.

The decree, as the record shows, turned upon questions of fact and of general law, unaffected by any ruling upon any federal question. The case is part of a prolonged litigation which is now brought to our attention for the fourth time. 225 U. S. 205; 239 U. S. 628; *ibid.* 629. It has engaged the attention of the courts of two circuits on several occasions, some of the decisions being reported and others not. 170 Fed. Rep. 689; 218 Fed. Rep. 987; 219 Fed. Rep. 803; 233 Fed. Rep. 991; 241 Fed. Rep. 357. Upon the questions of fact the courts in the two circuits, proceeding independently, have reached identical conclusions. The questions of law are few and well settled. After examining the record in the light of the opinions below and the assignments of error here we are convinced

that the rulings were right, so clearly so that the appeal seems to be without reasonable justification, and therefore to have been taken for delay. The motion to affirm is accordingly sustained.

Decree affirmed.